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OFFICE OF PERSONNEL MANAGEMENT

5 CFR Part 890

RIN 3206-AG40

Federal Employees Health Benefits Program; HMO Plan Applications

AGENCY: Office of Personnel
Management.

ACTION: Interim regulations with request
for comments.

SUMMARY: The Office of Personnel Management (OPM) is issuing interim regulations to clarify the policy under which it invites applications from comprehensive medical plans (HMO's) after a determination that it would be beneficial to enrollees and the Federal Employees Health Benefits (FEHB) Program to do so. This clarification is necessary in order to ensure that OPM and the HMO's are providing the best possible service to FEHB enrollees.

DATES: Interim regulations are effective January 4, 1995. Comments must be received on or before February 3, 1995.

ADDRESSES: Written comments may be sent to Lucretia F. Myers, Assistant Director for Insurance Programs, Retirement and Insurance Group, Office of Personnel Management, P.O. Box 57, Washington, DC 20044; delivered to OPM, room 4351, 1900 E Street, NW., Washington, DC; or FAXed to (202) 606-0633.

FOR FURTHER INFORMATION CONTACT:
Mary Ann Mercer, (202) 606-0191.

SUPPLEMENTARY INFORMATION: OPM is issuing interim regulations to clarify the policy under which the Director of OPM invites applications from HMOs interested in participating in the FEHB Program. As administrator of the FEHB Program, it is necessary that OPM consider the needs of FEHB enrollees and the FEHB Program in determining whether to invite applications from

HMOs for a given contract year. Consequently, each year, the Director makes a determination whether or not it would be beneficial to enrollees and the FEHB Program to invite HMOs to apply. This authority parallels OPM's discretion to consider changes in the rates and benefits of participating plans when the Director of OPM deems it in the best interest of enrollees and the FEHB Program (§ 890.203(b)).

With only limited possible exception, OPM does not intend to accept HMO applications for the 1996 contract year. We also plan to keep in place for the 1996 contract year the benefits that go into effect in 1995 for plans already participating in the FEHB Program. Further, OPM will print no new plan brochures for existing plans or comparison guide for contract year 1996.

On a limited basis, OPM will entertain applications from HMOs where it would improve the access to medical care in a medically underserved state. That is, we will consider applications from HMOs only in states designated as medically underserved areas (MUAs), as determined by OPM under the methodology cited in 5 U.S.C. 8902(m)(2)(A), where the choice of an HMO is limited or would otherwise be nonexistent. To be considered by OPM, the plan must be in a state that qualifies as an MUA on January 31 of the year preceding the FEHB Program contract year for which the application has been submitted. OPM expects that, under this exception, plans will be accepted only under rare and unusual circumstances.

Except in these situations, the information disseminated during the November-December 1995 Open Season will be limited to rate change information for plans currently participating in the Program. In the future, OPM will publish a notice in the *Federal Register* inviting applications from plans interested in participating in the FEHB Program. We anticipate considering all applications for contract year 1997.

This course of action is necessary so that OPM may utilize its resources in the most effective way and in a manner most beneficial to enrollees. It is in the best interest of enrollees that OPM ensure that FEHB Program contracts are administered so that benefits to enrollees are optimum and the costs to enrollees and the FEHB Program are

minimized. OPM shares the concern of the Congress, the General Accounting Office (GAO), and the Office of Management and Budget (OMB) about contract administration under the FEHB Program. In order to improve standards and oversight of insurance carriers and enhance our overall program operations to improve service to OPM's customers, additional emphasis needs to be placed on functions that, of necessity, are given lower priority when staff are occupied with applications, negotiations, and open season materials review.

During 1995, OPM will redirect resources to projects designed to address weaknesses in the oversight of contractor performance as well as improve communication with FEHB enrollees to ensure that we and our participating carriers are meeting their needs. In future years, we will prioritize functions.

While OPM is not required to issue regulations that clarify existing policy, we understand that there is interest in this issue, and we wish to give all parties an opportunity to comment. We are publishing the regulation at this time before interested HMOs begin the time-consuming application process.

Waiver of Notice of Proposed Rulemaking

Pursuant to section 553(b)(3)(A) of title 5 of the U.S. Code, I find that good cause exists for waiving the general notice of proposed rulemaking. The interim regulations simply clarify OPM's policy under which it invites applications from HMOs interested in participating in the FEHB Program.

E.O. 12866, Regulatory Review

This rule has been reviewed by OMB in accordance with E.O. 12866.

Regulatory Flexibility Act

I certify that these regulations will not have a significant economic impact on a substantial number of small entities because they primarily affect OPM's administrative procedures.

List of Subjects in 5 CFR Part 890

Administrative practice and procedure, Government employees, Health facilities, Health insurance, Health professions, Hostages, Iraq, Kuwait, Lebanon, Reporting and recordkeeping requirements, Retirement.

Office of Personnel Management.

James B. King,
Director.

Accordingly, OPM is amending 5 CFR part 890 as follows:

PART 890—FEDERAL EMPLOYEES HEALTH BENEFITS PROGRAM

1. The authority citation for part 890 continues to read as follows:

Authority: 5 U.S.C. 8913; § 890.803 also issued under 50 U.S.C. 403p, 22 U.S.C. 4069c and 4069c-1; Subpart L also issued under sec. 599C of Pub. L. 101-513, 104 Stat. 2064, as amended.

2. In § 890.203, paragraph (a)(1) is revised, paragraphs (a)(2) through (a)(4) are redesignated as paragraphs (a)(3) through (a)(5) respectively, the last sentence in newly designated paragraph (a)(5) is revised, a new paragraph (a)(2) is added, and a heading is added for paragraph (b) to read as follows:

§ 890.203 Application for approval of, and proposal of amendments to, health benefits plans.

(a) *New plan applications.* (1) The Director of OPM shall consider applications to participate in the FEHB Program from comprehensive medical plans (CMP's) at his or her discretion. If the Director of OPM determines that it is beneficial to enrollees and the Federal Employees Health Benefits Program to invite new plans to join the Program, OPM will publish a notice in the *Federal Register*.

(2) When invited to participate, CMP's should apply for approval by writing to the Office of Personnel Management, Washington, DC 20415. Application letters must be accompanied by any descriptive material, financial data, or other documentation required by OPM. Plans must submit the letter and attachments in the OPM-specified format by January 31 of the year preceding the contract year for which applications are being accepted. Plans must submit evidence demonstrating they meet all requirements for approval by March 31 of the year preceding the contract year for which applications are being accepted. Plans that miss either deadline cannot be considered for participation in the next contract year. All newly approved plans must submit benefit and rate proposals to OPM by May 31 of the year preceding the contract year for which applications are being accepted to be considered for participation in that contract year. OPM may make counter-proposals at any time.

* * * * *

(5) * * * The extent of the data and documentation to be submitted by a

plan so certified by HHS, as well as by a non-certified plan, for a particular review cycle may be obtained by writing directly to the Office of Insurance Programs, Retirement and Insurance Group, Office of Personnel Management, Washington, DC 20415.

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(b) *Participating plans.* * * *
[FR Doc. 94-29809 Filed 12-2-94; 8:45 am]
BILLING CODE 325-01-M

DEPARTMENT OF JUSTICE

Immigration and Naturalization Service

8 CFR Parts 208, 236, 242, 274a, and 299

[INS No. 1651-93; AG Order No. 1937-94]

RIN 1115-AD64

Rules and Procedures for Adjudication of Applications for Asylum or Withholding of Deportation and for Employment Authorization

AGENCY: Immigration and Naturalization Service, Justice.

ACTION: Final rule.

SUMMARY: This final rule streamlines the adjudication of asylum applications submitted to the Immigration and Naturalization Service (INS). Asylum officers who adjudicate the applications of persons who have no legal immigration status will no longer prepare detailed denials. Instead, in almost all cases, asylum officers will grant meritorious applications and refer applications that they do not grant to immigration judges, who will adjudicate the claims in either exclusion or deportation proceedings. The rule restricts employment authorization to applicants for asylum or withholding of deportation whose claims either have been granted or remain pending after more than 150 days, a period which would not run until the alien has filed a complete application and which would not include delays sought or caused by the applicant. This rule conforms existing regulations to the current practice of receiving applications for asylum and withholding of deportation at the four INS Service Centers. The rule also updates the regulations by removing references to the Asylum Policy and Review Unit.

EFFECTIVE DATE: This rule is effective January 4, 1995.

FOR FURTHER INFORMATION CONTACT: Christine Davidson, Senior Policy Analyst, Asylum Division, Immigration and Naturalization Service, 425 I Street

NW., ULLICO 3rd Floor, Washington, DC 20536, (202) 633-4389, or Gerald S. Hurwitz, Counsel to the Director, Executive Office for Immigration Review, 2400 Skyline Tower, 5107 Leesburg Pike, Falls Church, VA 22041, (703) 305-0470.

SUPPLEMENTARY INFORMATION: The Department of Justice published a proposed rule on March 30, 1994 (59 FR 14779) as part of a comprehensive initiative to streamline the process for adjudication of applications for asylum and withholding of deportation. Other aspects of this initiative have increased the government's ability to adjudicate such applications efficiently.

The proposed rule was designed to streamline the asylum adjudications process by making several principal reforms. First, the role and functions of asylum officers would change to allow the officers to address a greater volume of applications and to concentrate their efforts on approving meritorious claims. Asylum officers would no longer deny applications from persons who are excludable or deportable, but instead would refer such cases directly to an immigration judge for adjudication. The original application also would be forwarded to the immigration judge to form part of the record of proceedings. Second, the proposed rule would have instituted a fee for filing asylum applications. Third, an asylum applicant would not be eligible to apply for employment authorization based on his or her asylum application until 150 days after the date on which the asylum application is filed. The Immigration and Naturalization Service (INS) and the Executive Office for Immigration Review (EOIR) would strive to complete the adjudication of asylum applications, through the decision of an immigration judge, within this 150-day period. Persons granted asylum would become eligible immediately to apply for and receive employment authorization. Persons whose cases were not decided by an immigration judge within the 150-day period would be eligible to apply for employment authorization. The INS would have 30 days to adjudicate such applications. Persons denied asylum by an immigration judge either within the 150-day period or prior to the issuance of employment authorization by the INS would not be eligible to receive employment authorization.

Beyond these principal reforms, the proposed rule would have: eliminated the requirement that asylum officers and immigration judges await the receipt of advisory opinions from the Department of State; curtailed the authority of asylum officers to grant or deny

withholding of deportation under section 243(h) of the Immigration and Nationality Act, 8 U.S.C. 1253(h) (INA or Act); and specified that information provided in asylum applications could be used as a basis for an Order to Show Cause against the applicant under 8 CFR 242.1. The proposed rule also would have made several technical and conforming amendments.

The Department of Justice received 345 comments in response to this proposed rule. Many were submitted as a result of consultations between various non-governmental organizations. The following sections summarize the comments, set forth the response of the Department of Justice, and explain the revisions adopted.

The comments primarily focused upon the following topics: conformity with the Administrative Procedure Act (APA); constitutional questions; the proposed \$130 filing fee; retroactivity of the proposed rule; service of notice; employment authorization; the discretionary nature of asylum interviews; interpreters; the "safe third country" ground of denial for applicants otherwise eligible for asylum; the elimination of the Notice of Intent to Deny (NOID) and the applicant's opportunity to rebut a NOID; and the definition and treatment of persons convicted of an aggravated felony. In addition, there were general comments regarding United States immigration policy.

Many comments agreed that asylum reforms and a solution to the backlog problem are needed. Some stated, however, that even if the proposed rule met the objectives of the Immigration and Naturalization Service, it would do so at the expense of *bona fide* asylum applicants and would compromise fairness and humanitarian principles. Many comments stated that the proposed rule would not stop frivolous claims or reduce the backlog.

1. Administrative Procedure Act Issues

Comment: Several comments stated that the proposed rule violated the requirements of the Administrative Procedure Act (APA) because the rule included changes to regulations affecting the Executive Office for Immigration Review (EOIR), and the INS has no authority to promulgate regulations on behalf of EOIR. Sections alleged to fall within EOIR's jurisdiction were 208.1, 208.2, 208.3, 208.12, 208.14, 208.18, 236.3, and 242.17. The comments suggested that the Department should republish the sections of the proposed rule that pertain to EOIR proceedings with

instructions that comments should be directed to the EOIR.

Response and Disposition: The proposed rule was published by the Department of Justice. The Attorney General has authority to promulgate regulations on behalf of all Department of Justice agencies, including INS and EOIR. Officials of EOIR participated in drafting all relevant provisions of the proposed rule. Upon publication of the rule, the name, address, and phone number of the Counsel to the Director of EOIR were included as a point of contact for further information. Since this rule chiefly concerns the process for adjudicating asylum applications that are received in the first instance by the INS, public comments were directed to the INS; however, a copy of every comment was forwarded by the INS to EOIR. Specific suggestions were made by EOIR and have been incorporated into this final rule. Accordingly, this rule has been issued in compliance with the notice and comment requirements of the APA.

2. Constitutional Issues

Comment: Several comments stated that the proposed rule would violate the Constitution by infringing upon liberty and property interests protected under the due process clauses of the Fifth and Fourteenth Amendments. The comments identified the following as violations of due process: (a) not every asylum applicant would receive an asylum officer interview, which is essential for an asylum officer genuinely to evaluate a case; (b) those denied an interview would be deprived of the opportunity to have their claim decided in a non-adversarial setting and instead would be required to present their asylum claim to an immigration judge during an adversarial proceeding; (c) an applicant not granted asylum would be denied the opportunity, available under the current procedures, to rebut the asylum officer's initial determination to deny the claim (Notice of Intent to Deny); and (d) due to elimination of the Notice of Intent to Deny (NOID), the applicant would not have access to the information that the asylum officer relied upon in deciding not to grant the claim. The comments stated that such infringement could not be justified by the Government's interest in improving the efficiency or financial viability of the asylum process.

Comments stated that procedures similar to those in the proposed rule have been invalidated by the federal courts. They pointed to *Mendez v. Thornburgh*, No. 88-04995 (C.D. Cal., Order filed May 26, 1989, modified June 23, 1989), in which the court

preliminarily enjoined an expedited adjudication process put into place in Los Angeles and stated that applicants were entitled to a re-interview. Comments also noted *American Baptist Churches v. Thornburgh*, 760 F. Supp. 796 (N.D. Cal. 1991) (hereinafter "ABC"), in which the Government agreed to re-interview Salvadoran asylum-seekers. Comments suggested that agency efforts to expedite the asylum process through measures compromising due process and equal protection have been enjoined as a "pattern and practice violation" in a number of other cases.

Response and Disposition: The proposed rule fully recognized the due process rights of asylum applicants. By preserving asylum and withholding of deportation proceedings before an immigration judge, the rule provides due process: (a) the applicant is permitted to testify and submit all relevant evidence in support of his or her claim; (b) the applicant may be represented by an attorney; (c) the applicant is entitled to cross-examine all witnesses presented by the Government and to rebut any documentary evidence submitted by the Government; and (d) the applicant has the right to administrative appeal and judicial review of an adverse decision. In addition, as discussed below, the final rule amends the proposed rule by providing that the INS will conduct interviews for all asylum applicants within its jurisdiction who have filed a complete application. All who apply for asylum before an asylum officer will thus have an opportunity to present their claim in a nonadversarial proceeding. Furthermore, neither the settlement agreement in *Mendez* nor the settlement agreement in *ABC* suggests that INS procedures were invalid. The rule does not single out any class of applicants for distinct treatment and all asylum applicants will be treated in the same manner without regard to nationality or country of origin. Asylum officers will interview all applicants who appear for their scheduled interviews before determining whether to grant, deny, or refer their applications.

3. Federalism Issues

Comments: Several comments argued that the proposed rule required a "cost benefit assessment" under Executive Order 12866 because it constitutes a "significant regulatory action." The comments also suggested that the Department was required to perform a "federalism assessment" under Executive Order 12612, since portions of the regulation could affect state

governments' public welfare programs. The comments argued that the inability of asylum applicants to work for 180 days and during the appeal process could lead the applicants and their families to rely on state public assistance that they might not turn to if authorized to work. This, the comments stated, constitutes a "substantial direct effect on the States," triggering the need for a federalism assessment.

Response and Disposition: Executive Order 12866 requires an agency to submit a draft proposed rule and an assessment of the potential costs and benefits of the regulation to the Office of Management and Budget (OMB) for review if the agency or OMB considers the rule "to be a significant regulatory action" under section 3(f) of that Order. The Department of Justice considered the proposed rule to be a significant regulatory action and complied with the Executive Order by submitting a copy of the draft proposed rule and a summary of the reasons for the regulation to the OMB. See 59 FR 14784 (March 30, 1994).

Executive Order 12612 requires a federalism assessment if a proposed regulation has "substantial direct effects on the States, on the relationship between the national government and the States, or on distribution of power and responsibilities among the various levels of government." Whether policies have federalism implications depends principally on whether the policies would preempt state law or interfere with an area of regulation that is usually reserved to the states. If an agency determines that a policy has federalism implications, the federalism assessment must consider the costs or burdens the regulations would impose on the states and resources available to the states to offset the added costs or burdens.

The Department and OMB determined that Executive Order 12612 did not require a federalism assessment of this rule. Regulations regarding immigration and alienage are an exclusive federal concern, and thus do not preempt state law or impinge upon areas of state regulation. Furthermore, Congress has enacted specific legislation governing the employment of aliens which authorized the promulgation of regulations on the subject. The rule also would not have a substantial direct effect on the states. While it is possible that asylum applicants not eligible to apply for work authorization might seek state benefits, the nature and degree of any such claims are at best an indirect effect of the adoption of new asylum procedures. Many asylum seekers have entered the United States illegally and are not eligible for most state benefits;

and some state benefits, such as education, are available regardless of whether an applicant has work authorization. Meanwhile, the overall asylum reform effort should reduce the pressure on state public assistance benefits by more promptly granting asylum and work authorization to those deserving of these benefits and more promptly removing from the United States those who are not. Accordingly, there is no need for a federalism assessment under Executive Order 12612.

4. Filing Fee for Asylum Applications (8 CFR 103.7(b)(1))

Proposed Rule: The proposed rule would have amended 8 CFR 103.7(b)(1) to provide that a fee of \$130 be charged for an application for asylum or withholding of deportation. Section 208.4(d) would have been amended to provide that an application be accompanied by such fee or by an application for waiver of fee in accordance with 8 CFR 103.7(c)(1).

Comments: Comments supporting fees argued that asylum applicants should have to pay a filing fee if they can afford to do so, that the general public does not benefit from services provided by the INS, and that taxpayers should not have to bear the entire cost.

Most comments, however, urged either elimination or reduction of the fee. It was argued that the proposed fee would unfairly punish persons seeking protection from persecution, treat asylum as a privilege limited to those who could afford it, discourage *bona fide* applications, and create a burden for the INS in administering the fee waiver provisions. Several comments claimed that the fee would be unfair in light of the proposed rule's limitation on an asylum applicant's access to employment authorization pending the adjudication of the asylum claim. Other comments stated that the amount of the fee was excessive: even if an applicant could not qualify for a fee waiver, he or she might still be unable to apply for asylum due to the overall cost, including those for an attorney, counselor, and interpreter, to complete the asylum application process. These comments unfavorably compared the proposed fee to those charged by The Netherlands (\$25.00) and Australia (\$30.00), the only countries that now charge an application fee, and suggested that a fee at this level would be more appropriate.

Several comments also argued that charging a fee would not be economically efficient. Collecting the fee and administering a waiver system would create significant administrative

costs. Adjudicating waivers, aside from being time-consuming, would increase personnel costs and paperwork, would add an additional step to the adjudication process, and would expose the INS to litigation over contested waiver decisions. If, as anticipated, a large number of applicants applied for and obtained fee waivers, the costs in administering the fee and the waiver might not even offset the relatively low amount of fees collected.

Several comments also questioned whether the INS could fairly administer a fee waiver process. They alleged that the INS previously has used improper criteria in adjudicating applications for waivers of fees for Temporary Protected Status and for renewal of employment authorization documents. These comments urged that the process be fairly implemented by removing irrelevant discretionary factors from the waiver procedure and focusing solely on the applicant's ability to pay the fee. Some argued that the INS should propose, publish, and elicit public comments on uniform guidelines for adjudicating fee waivers for all INS applications. Others argued that the INS should create a fee waiver process for asylum applicants under a separate regulation, independent of 8 CFR 103.7(c). Some proposed that asylum applicants filing through an approved voluntary agency or an accredited representative should receive automatic fee waivers. Many comments suggested that waiver guidelines should incorporate the poverty guidelines of the Department of Health and Human Services. Some comments suggested that a time limit be set within which the INS must make waiver determinations and, if the decision is not made within that time, that the waiver be granted. Comments also suggested that the fee-paying or waiver status of the applicant not be disclosed to the asylum officer adjudicating the claim. One comment suggested that the filing of a fraudulent fee waiver be used as evidence weighing against the applicant's credibility on the underlying asylum claim.

Several comments stated that under section 286(m) of the Act, 8 U.S.C. 1356(m), the INS may not impose a fee for asylum applications. This section provides that the INS may set its fee for providing adjudication and naturalization services at a level that will ensure the full recovery of costs for those services, including those provided without charge to asylum applicants or other immigrants. Several comments also stated that a specific fee for asylum applications is unnecessary because after the implementation of asylum reform, the surcharge added to INS fees

in conformance with section 286(m) should generate sufficient revenues to cover the costs of the asylum program.

A number of comments made recommendations for changing the fee proposal. One comment proposed setting the fee at \$615, which is the estimated total cost of adjudicating an asylum application. Under this proposal, if the applicant could not pay the fee at the time of filing, then he or she should pay half of the fee at the time of filing and pay the balance within 90 days or at the time of the interview, whichever is sooner. One comment suggested loaning the entire cost of asylum processing (\$615) to the applicant. The loan could be paid back in one to three years as the person begins to work.

Some comments suggested that the fee be deferred so that a person granted asylum pay the fee when he or she applies for adjustment of status or for any other subsequent benefit under the Act. For those whose applications are denied and who subsequently seek another immigration benefit, such as adjustment of status upon marriage or reentry after deportation, the asylum fee would be collected at the time the applicant submits the respective application. The comments argued that applicants will be in a better position to pay the fee at the time of these subsequent applications.

One comment suggested that the fee not be charged to those who file their asylum application before an immigration judge in exclusion or deportation proceedings. This comment noted that most of the alleged abuse of the asylum system occurs in applications filed with asylum officers and that it is unfair to charge a fee to those who are defending themselves in removal proceedings.

Response and Disposition: The comments received in response to the fee proposal have been carefully considered. It has been concluded that imposition of the fee at this time would likely impose administrative burdens that would not be offset by the anticipated receipts from the fee. Accordingly, the provisions relating to the fee are not included as part of the final rule. Adjudication of asylum applications before the INS will continue to be funded by way of a statutorily authorized surcharge assessed on applications for other immigration benefits. Additional funding provided by the 1995 appropriations for Asylum Reform will provide resources for INS and EOIR. As part of an ongoing comprehensive economic review of its entire fee structure, the INS will examine

alternative sources of funding for asylum adjudications, including the possibility of a user fee.

5. General (8 CFR 208.1)

a. Effective Date (8 CFR 208.1(a))

Proposed Rule: The proposed rule would have amended 8 CFR 208.1(a) to state that Part 208 applies to all adjudications of asylum applications, whether by an asylum officer or by an immigration judge, on or after the effective date of the final rule.

Comments: Many comments urged INS not to apply some or all of the proposed amendments to Part 208 to applications filed prior to the effective date of the final rule. These comments suggested that a "retroactive" application of the rule could result in different treatment for asylum applicants who filed at the same time, but prior to the effective date of the final rule—namely: claims filed and adjudicated before the effective date of the final rule will have been processed under the prior practice of a mandatory asylum officer interview and opportunity to rebut a NOID; NOIDs are eliminated for claims filed but not adjudicated by the effective date and, under the proposed rule, such claims could be referred immediately to an immigration judge without an interview by an asylum officer. Some comments also noted that making the rule applicable to applications that have already been filed would have no effect in discouraging the prospective filing of non-meritorious applications.

A number of comments argued that the proposed rule is invalid under the Supreme Court's decision in *Bowen v. Georgetown University Hospital*, 488 U.S. 204 (1988), which held that retroactive rulemaking is improper under the APA absent express statutory authority, because Congress has not given the Attorney General retroactive rulemaking authority through the Immigration and Nationality Act.

~ Finally, one comment argued that applying the proposed rule to "all adjudications" creates conflicts with judicial decisions and settlement agreements in litigation concerning asylum procedures.

Response and Disposition: These comments were carefully considered, but it was concluded that the effective date provision does not run afoul of *Bowen v. Georgetown University Hospital*. The rule is not "retroactive" within the meaning of that case because it does not alter the past legal consequences of past actions; rather, it affects only procedures that are to be

followed in cases that are yet to be adjudicated.

The effective date provision applies only to adjudications of applications for asylum or withholding of deportation under 8 CFR Part 208. The rule therefore will not apply to the amended provisions of 8 CFR 242.17(e) regarding the use of information provided on an asylum application as the basis for establishing the alienage or deportability of an asylum applicant, or to the related provision at 8 CFR 208.3(c)(2). These amended provisions will apply only to applications received by the INS after the effective date of the final rule. Similarly, the effective date provisions do not affect 8 CFR 274a.12(c)(8). Thus, asylum applicants who have filed their applications prior to the effective date of the final rule will not be subject to the final rule's provisions governing initial applications for employment authorization. Sections 208.7(a) and 242.17(e) of the final rule will be amended to clarify this point. However, the rule governing extensions of employment authorization in § 208.7(d) shall apply to all asylum applicants upon the effective date of this rule. Furthermore, the final rule cannot and does not intend to alter any obligations imposed on the INS or asylum applicants by judicial decisions or settlement agreements in cases such as *ABC* or *Mendez*. Finally, the rule will not apply to cases pending in district courts, courts of appeals, or the Supreme Court.

The other aspects of the rule, while they would affect pending applications, do not affect the past legal consequences of past actions, but merely affect procedures to be applied in the future. The main procedural differences under this rule are elimination of the NOID and written denial decisions by asylum officers. These changes, however, do not alter the legal circumstances or rights of any person with a pending application. No person eligible for asylum under existing regulations will be rendered ineligible due to any change made by this rule. Asylum claims will continue to be adjudicated under the same legal standard.

Limiting application of the final rule to applications filed after the effective date would severely impair efforts at asylum reform because it would require two parallel systems of adjudication: one for cases filed before the effective date, one for cases filed afterwards. Neither the Supreme Court's decision in *Bowen* nor any section of the APA requires such a result. The rule achieves the goal of streamlining the asylum process while maintaining the same legal standards used to adjudicate each

asylum application in a timely manner. This provision of the proposed rule will be adopted in the final rule with amendments for clarity.

b. Qualifications and Training of Asylum Officers (8 CFR 208.1(b))

Comments: Two comments suggested that both immigration judges and asylum officers receive special training in international human rights law, conditions in countries of origin, and other relevant national and international refugee laws. One comment observed that the current rule that provides for extensive training of asylum officers has improved their decision-making, and reasoned that the same requirement would have a similar effect on the decisions of immigration judges.

Response and Disposition: The Department provides extensive initial training and continuing education to immigration judges that includes training related to asylum adjudications. The Department will continue to work to improve such training programs. However, the Department does not consider it necessary that there be specific regulatory requirements regarding the training of immigration judges.

6. Form of Application (Section 208.3)

a. Required Copies of Forms (8 CFR 208.3(a))

Proposed Rule: Section 208.3(a) of the proposed rule stated that the applicant file three copies of any supporting documentation and one completed fingerprint card (Form FD-258) for all individuals ages 14 years and older who are included on the application.

Comments: One comment stated that it is not clear whether two or three copies of the application are required, and another questioned the reason for requiring three copies of supporting documentation.

Response and Disposition: The final rule has been clarified to make clear that the I-589 and supporting documents, plus two copies, are required. Three copies of supporting documentation are required because one copy is retained by the INS in the applicant's alien registration file, one copy is forwarded to the Department of State under 8 CFR 208.4(a), and, if the application is not granted by the asylum officer, a copy of the application with all supporting documents is forwarded to the immigration judge under the referral process described in 8 CFR 208.14(b). This provision of the proposed rule has been amended to clarify that the original and two copies of the application are required.

b. Use of Information in Application (8 CFR 208.3(c)(2))

Proposed Rule: Section 208.3(c)(2) of the proposed rule stated that information provided in an asylum application may be used to satisfy the Government's burden of proof in establishing deportability under section 242 of the Act, 8 U.S.C. 1252.

Comment: One comment asserted that the proposed rule should state that the information in the asylum application may not satisfy the clear, convincing, and unequivocal standard of evidence for deportability.

Response and Disposition: The Department believes that an alien's written admission of alienage and of having no lawful status in the United States is sufficient to satisfy the standard of evidence for establishing deportability. Consequently, the new asylum application will contain a clear warning that the application may be used to establish deportability. This part of the final rule will not be applied retroactively and will affect only those persons who make an application on the new form after the effective date of this rule. Accordingly, this provision of the proposed rule will be adopted without amendment in the final rule.

c. Delivery by Mail (8 CFR 208.3(c)(3))

Proposed Rule: Section 208.3(c)(3) of the proposed rule stated that mailing to the address provided on the application shall constitute adequate service of all notices and other documents, including any charging documents (Forms I-221 and I-122).

Comments: Several comments argued that delivery by regular mail of an Order to Show Cause (OSC) violates section 242B(a)(1) of the Act, 8 U.S.C. 1252b(a)(1), which requires that OSCs be presented by personal service or certified mail. Other comments argued that the OSC should be served by certified mail to ensure that it is actually received and that the rule does not take into consideration that an applicant may move after his or her application has been filed.

Three comments also addressed the issue of service to legal representatives. One comment stated that if the applicant is represented by an attorney, service should be made on the applicant's legal representative, rather than on the applicant. Another comment recommended that mailing documents to the applicant's attorney or representative also should constitute adequate service. Finally, a comment asserted that EOIR should be informed whether an applicant was represented by an attorney at the Asylum Office.

Response and Disposition: This provision is not intended to—and legally could not—alter the certified mail delivery requirements in section 242B of the Act, 8 U.S.C. 1252b. In cases where personal delivery of the OSC is not possible, OSCs will continue to be served by certified mail. This provision is adopted with an appropriate clarifying amendment in the final rule.

The recommendations regarding service upon attorneys or registered representatives have been considered carefully. The Department believes that the rules for service of an OSC must ensure that the person subject to proceedings has actually received the document. The Department also is concerned that an attorney retained for the asylum process might not remain as the applicant's attorney in exclusion or deportation proceedings. As this final rule is implemented, the INS will work with attorneys and advocacy organizations to consider these and other proposals relating to the service of notices and other documents, but the suggestion of having charging documents mailed to an applicant's attorney or representative constitute adequate service has not been adopted.

d. Signatures under Penalty of Perjury (8 CFR 208.3(c)(4) and 8 CFR 208.3(d))

Proposed Rule: Sections 208.3(c)(4) and 208.3(d) of the proposed rule stated that the applicant and anyone other than an immediate relative of the applicant who prepares or assists the applicant in preparing the asylum application must sign the application subject to penalty of perjury. A person other than an immediate relative who prepares or assists the applicant in preparing the application also must provide his or her full mailing address. In addition, if the applicant later claims ignorance of the contents of the application, his or her signature may provide the basis for denial of the claim.

Comments: Several comments suggested that any preparer, including an immediate relative, sign the asylum application under penalty of perjury and provide an address. One comment argued that exempting family members from signing the I-589 weakens the regulation because unscrupulous preparers, to remain undetected, will not sign the application.

Many other comments criticized this provision as unduly punitive because many asylum applicants have limited education, are unfamiliar with United States laws, and rely on those who claim to be qualified to assist them with their asylum applications. Such applicants should not be subject to prosecution if there are errors in the

application. Some comments asserted that this provision will prevent applicants from obtaining help in completing their applications. In addition, one comment claimed that those assisting applicants might fear reprisal from their own governments if their role in assisting asylum applicants were known. Another stated that organizations may not wish to sign the forms because of their unwillingness to incur potential liability for an inaccurate representation not known to them. One comment argued that subjecting persons other than the applicant to penalty of perjury places an undue burden on attorneys and translators who are assisting applicants but can do little to verify the veracity of the applicants' statements.

The comments made several recommendations directed at protecting applicants and the individuals and organizations who assist applicants. One comment recommended that only the preparers, not the applicants, should sign the asylum application subject to a penalty of perjury because genuine asylum-seekers, particularly those that do not speak English, may be unaware of the actions of an unprincipled preparer. One comment advocated that those who prepare asylum applications without charging the applicant a fee should not be required to sign the form. Another comment suggested that if an improperly prepared asylum application is not signed by the preparer, the asylum officer should ask the applicant who prepared the application. With the applicant's permission, the asylum officer then could relay the information about the preparer to the appropriate local INS enforcement division.

Finally, two comments asserted that the signature requirement is too broad. The comments claimed that the signature requirement in the proposed rule is more sweeping than the requirement on the form itself, and that it fails to specify the degree of assistance that triggers the necessity to sign the form.

Response and Disposition: The requirement that the applicant and outside preparers sign the Form I-589 under penalty of perjury is necessary and appropriate for several reasons. An asylum applicant is seeking an important benefit and should be required to provide only truthful information to the Government. The evidentiary rules for adjudicating asylum applications treat the credible testimony of the applicant as sufficient to meet the applicant's burden of proof and thus there should be appropriate consequences for making false statements. Those who assist in

preparing applications also should bear these consequences if they have knowingly included false information on the application.

The fact that a signature is made under penalty of perjury does not, of course, alter the Government's burden to establish the elements of the crime in the event of prosecution. Many of the objections raised in the comments would apply to situations where perjury could not be proved. Nevertheless, those applying for asylum and those who assist others in doing so should have the same obligation to make truthful statements as persons who make other applications to the Government. These provisions of the proposed rule will be adopted in the final rule, with amendments for clarity and to eliminate unnecessary words.

e. Incomplete Applications (8 CFR 208.3(c)(5) and 8 CFR 208.3(c)(6))

Proposed Rule: Section 208.3(c)(5) of the proposed rule stated that an application that is incomplete or lacks a response to each of the enumerated questions may be referred to an immigration judge for adjudication or may be denied by the asylum officer. Section 208.3(c)(6) defined an incomplete application as one that does not include a response to each of the questions contained in the Form I-589, that is unsigned, that is unaccompanied by the required materials specified in paragraph (a) of this section, or that is unaccompanied by the required fee or application for fee waiver.

Comments: Numerous comments criticized these provisions for establishing overly harsh penalties and for not including a sufficiently clear definition of what constitutes an incomplete application. The comments claimed that an application may be denied or referred because minor or irrelevant questions were not answered. The comments suggested that the applicant be given a chance to remedy such an omission. The comments also questioned whether an application would be deemed incomplete if certain questions were answered but the responses lacked substance.

Several comments agreed that incomplete applications should not be adjudicated and recommended amendments to the rule. One comment suggested that this provision be moved to a new subsection and labelled "Summary Disposition—Action on Incomplete Forms." Another comment suggested that the term "incomplete" be deleted from the final rule in order to restrict the rule to allow denial or referral only when the applicant has been completely unresponsive to a

question. A third comment advocated that incomplete applications be returned to the applicant, rather than denying them or referring them to an immigration judge.

Response and Disposition: The final rule retains the current mandate that all asylum applicants who appear as scheduled will receive an interview with an asylum officer.

Accordingly, incomplete applications will not be denied or referred to an immigration judge without an interview. These sections of the proposed rule are therefore adopted with appropriate amendments in the final rule. The final rule provides that an incomplete application shall be returned by mailing it to an applicant within 30 days of receipt of the application by the INS; and that if an application has not been returned within this 30-day period, the application shall be deemed complete. Under section 208.7 of the final rule, if the application is incomplete, the 150-day period will not begin until the applicant submits a complete application. For clarity, the last sentence of § 208.3(c)(6) of the proposed rule, defining an incomplete application, is moved to paragraph § 208.3(c)(5) of the final rule. This definition also has been clarified to state that an application that is not returned to an applicant within 30 days of having been received by the INS shall be deemed complete.

7. Employment Authorization (Section 208.7)

Proposed Rule: The proposed rule would have amended the regulations governing eligibility of asylum applicants for employment authorization in the following manner: An application for employment authorization (Form I-765) could be submitted to the INS no earlier than 150 days after the date on which a complete application for asylum was filed. If the asylum application was denied by an immigration judge or an asylum officer within the 150-day period, the applicant would not be eligible to apply for employment authorization. After 150 days, the INS would have 30 days from the date of the filing of the application for employment authorization to adjudicate the application for employment authorization. If the INS failed to adjudicate the application for employment authorization within the 30-day period, the applicant would be eligible for interim employment authorization. If the application for asylum was denied by an immigration judge or an asylum officer within this 30-day period, the application for employment authorization would be

denied. The 150- and 180-day periods would be extended by any delay sought or caused by the applicant. The proposed rule also would have prohibited an applicant for asylum who has been convicted of an aggravated felony from applying for or being granted employment authorization. If an applicant who has been convicted of an aggravated felony has previously been granted employment authorization, the employment authorization would be revoked. Finally, an applicant who inexcusably failed to appear for a scheduled interview before an asylum officer or a hearing before the immigration judge would not be granted employment authorization. The proposed rule also would have amended the current rule by requiring a fee for the filing of an initial application for employment authorization.

Comments: A few comments supported these proposals as an appropriate balance between meeting the needs of asylum applicants while discouraging frivolous claims. A greater number of comments criticized these provisions for imposing economic hardship on asylum applicants. The comments stated that many applicants arrive in the United States with few belongings, no money, and no network of family or friends to provide them assistance. Furthermore, the United States does not provide public assistance benefits to most people who apply for asylum. As a result, asylum applicants would be forced to work illegally in jobs where they would be underpaid and treated poorly, but would have no means of redress because of the fear of reprisals. Other comments claimed that the rule would violate the right to work of asylum applicants and is inconsistent with the 1951 Convention Relating to the Status of Refugees, 189 U.N.T.S. 150, 19 U.S.T. 6260, T.I.A.S. 6577, and the 1967 Protocol Relating to the Status of Refugees, 606 U.N.T.S. 267, 19 U.S.T. 6223, T.I.A.S. 6577, because it creates an obstacle to the filing of an asylum application. Comments also stated that the rule would deny due process to asylum applicants because they would be unable to afford attorneys to represent them. Numerous other comments claimed that the rule would impose new burdens on social service organizations and state and local governments because asylum applicants unable to work will turn to these sources for assistance.

One comment specifically observed that a greater number of Cubans and Haitians will apply for cash and medical benefits under the Refugee Education Assistance Act of 1980, 8 U.S.C. 1522

note, and suggested that Cubans and Haitians be exempt from the employment authorization limitations under 8 CFR 208.7(a). Another comment contended that applicants paroled into the United States to file asylum claims will lose their work authorization under the proposed rule, which would be unjust because many such parolees have been recognized by the INS to have credible asylum claims.

Some comments indicated that the proposed rule is confusing because it does not specify that persons granted asylum are immediately eligible for work authorization and does not provide sufficient detail on how the 150-day waiting period will be measured. Other comments expressed doubt that asylum applicants would actually receive work authorization 180 days after the filing of their applications because of difficulty and confusion in applying the 150-day waiting period.

Many comments advocated eliminating the waiting period and maintaining the current rule, which allows immediate applications for employment authorization and issuance within 90 days. Some comments suggested a decrease in the waiting period with one specifically stating that employment authorization valid for 3 to 6 months should be granted at the time of the interview or within 90 days, except for cases deemed "frivolous" or "manifestly unfounded." Another comment advised providing exceptions to the waiting period by granting employment authorization immediately or within 90 days to applicants who demonstrate hardship or economic need (such as those with no relatives in the United States or who have small children). Another comment advocated issuing employment authorization at the time of the interview or hearing because it would ensure that applicants appear for their interview or hearing and allow the applicant to receive employment authorization sooner.

A number of comments suggested clarification of the 150-day waiting period. One comment noted that the 150-day period should begin when the application is received by the INS, rather than when the application is actually processed. Some comments argued that the INS should notify the applicant in writing of the date of receipt and whether the application is complete. Other comments criticized the provision for an extension of the 150-day period in the case of delays caused by the applicant, and one comment recommended that this aspect be eliminated. Another comment suggested, however, that the applicant be notified when additional information

is required and the waiting period be extended only if the additional information is not provided. Other comments asked for clarification as to what actions serve to extend the waiting period, and one comment requested that a mechanism to contest the extension be provided.

Finally, some comments opposed the inability of the applicant to obtain work authorization during the appeal period if his or her claim is denied by the immigration judge within the 180-day period. One comment noted that the applicant's access to counsel will be jeopardized on appeal while another observed that negative decisions frequently are reversed. A comment stated that such an applicant may face the choice of either starving or returning to a country where he or she faces persecution. Comments also stated that a decrease in appeals will hinder proper interpretation of the law by preventing the presentation of novel legal issues. These comments suggested that employment authorization be granted to applicants during the appeal process or that an exception for economic necessity be provided.

Response and Disposition: The Department strongly believes that the asylum process must be separated from the employment authorization process. This rule will discourage applicants from filing meritless claims solely as a means to obtain employment authorization. More important, the rule provides legitimate refugees with lawful employment authorization. When the system is fully operational, asylum officers are expected to grant or refer affirmative claims within about 60 days. Thus, persons with bona fide asylum claims would get work authorization in approximately the same time as the current 90-day period for adjudicating work authorization applications. All applicants could have work authorization after 180 days, unless their claims have been denied by an immigration judge. Under existing authority, work authorization may be granted to persons who are paroled into the United States by the INS, 8 CFR 274a.12(c)(11). This provision, which can be employed in the case of asylum applicants seeking admission at a port of entry to the United States and paroled into the country, is not changed in this rule.

The comments presented on this issue have been carefully considered. Particular attention was given to the recommendations that alternative means be established to adjudicate employment authorization on the basis of the merits of the claim or on the economic situation of the asylum

applicant. Either alternative would invite a large number of applications, thus diverting resources and undermining the goals of asylum reform. Using a merit-based standard would require the INS to adjudicate asylum applications for work authorization eligibility either through a paper evaluation or a separate work authorization interview. A need-based standard would impose a similar administrative burden. Given that the vast majority of those deserving asylum will promptly receive their decisions and, hence, their employment authorization, this burden would not be justified by the results achieved.

The Department also considered the claim that asylum applicants will disregard the law and work without authorization. While this is possible, it also is true that unlawful employment is a phenomenon not limited to asylum applicants, but is found among many categories of persons who have illegally entered or remained in the United States. The Department does not believe that the solution to this problem is to loosen eligibility standards for employment authorization. This is particularly so because of the evidence that many persons apply for asylum primarily as a means of being authorized to work. These rules will discourage applications filed for such reasons and thus will enable the INS to more promptly grant asylum—and provide work authorization—to those who merit this relief.

These provisions of the proposed rule also are in keeping with United States obligations under international law. Article 17 of the 1951 Convention provides that a "[c]ontracting State shall accord to refugees lawfully staying in their territory the most favourable treatment accorded to nationals of a foreign country in the same circumstances, as regards the right to engage in wage-earning employment." Under this rule, refugees—i.e., persons granted asylum—are immediately eligible to apply for and receive employment authorization. Article 17 imposes no further obligations on access to employment authorization for those who are applying for asylum.

The Department also has carefully considered the comments directed to the impact that new rules on employment authorization would have upon the states. These concerns are addressed under heading 3.

Consistent with its decision to remove the requirement for an asylum application fee, the Department will not adopt in this final rule a requirement that asylum applicants pay a fee to accompany an initial application for

employment authorization under 8 CFR 274a.13. The fee requirement will be retained for applications to renew employment authorization.

The provisions of the proposed rule are adopted with several amendments in the final rule. Sections 208.3(c)(5) and 208.7(a)(1) of the final rule will be amended to provide that the 150-day period shall commence upon the receipt by the INS of a complete application for asylum. The filing of an incomplete application shall not commence the 150-day period provided that the INS has returned the application by mailing it within 30 days in accordance with 8 CFR 208.3(c)(5). Section 208.7(a)(4) also will be amended to specify that an applicant's failure without good cause to appear for an interview under section 208.9(a) precludes the applicant from receiving employment authorization under section 274a.12(c)(8). Failure to appear without good cause to receive the decision of the asylum officer under section 208.9(d) shall be treated as delay caused by the applicant and shall toll the 150-day period. A new paragraph 208.7(a)(5) will be added to specify that the new rules governing eligibility for employment authorization do not apply to persons whose asylum applications have been filed prior to January 4, 1995. Finally, section 208.2(b) will be amended to state that an immigration judge may permit a referred applicant to file an amended application, but that any delay caused by such a request shall extend the period within which the applicant may not apply for employment authorization.

8. Renewal of Employment Authorization (Section 208.7(d))

Proposed Rule: Section 208.7(d) would be amended to require that in order for employment authorization to be renewed before its expiration, an application must be received by the INS at least 90 days before the employment authorization expires. Under current regulations, applications for renewal must be received at least 60 days prior to expiration.

Comment: Several comments criticized this proposal for placing an unfair and unnecessary burden upon applicants for renewal. The comments stated that the INS should be able to process renewals within 60 days. Some comments stated that renewal of work authorization should be assigned to INS District Offices, and not to the INS Service Centers, because the District Offices are more likely to have access to information regarding the alien's status. One comment approved of the practice of charging a fee for renewal of work authorization.

Response and Disposition: Under 8 CFR 274a.13(d), the INS district director shall adjudicate the application for renewal of employment authorization within 90 days of receipt.

The lack of uniformity between the current 60-day rule for filing renewal applications and the 90-day rule for adjudicating such applications led to disagreements between applicants and the INS. The INS believes that fewer disputes will result if these periods are uniform. The INS agrees that many such applications can be adjudicated in significantly less than 90 days, and will continue to work for improvements in this area. Due to the workloads involved in processing a large volume of employment authorization requests, however, the Department believes that it would not be prudent to establish a shorter mandatory period for the adjudication of such requests. Accordingly, these provisions of the proposed rule will be adopted without amendment in the final rule.

9. Interview and Procedure (Section 208.9(a))

a. Mandatory vs. Discretionary Interview

Proposed Rule: Current regulations require that for each application for asylum within the jurisdiction of an asylum officer, an interview shall be conducted by that officer. The proposed rule would provide that interviews on asylum applications are discretionary.

Comments: Many comments opposed making interviews discretionary. Some rested their objections in part on constitutional grounds; these concerns have been addressed above in subheading 2. The comments also expressed concern that direct referral of claims without an interview to an immigration judge is inappropriate because the written application often is not a reliable indicator of the strength or weakness of the applicant's claim. The comments argued that a system of discretionary interviews and direct referrals would be unfair because many applicants are unable fully to articulate their claim in writing due to language barriers, lack of understanding of the laws governing asylum, or innocent reliance on unscrupulous paid preparers of asylum applications. These comments argued as well that the asylum interview is of significant benefit because it allows the applicant to present the facts of the case in a nonadversarial manner and compels the asylum officer to consider the full range of facts, including all relevant country conditions, before making a determination in the case. While many comments acknowledged the advantages

of adversarial proceedings before an immigration judge in eliciting the facts of an asylum claim, the commentators generally felt that the value of an asylum interview should be given greater weight.

Several comments stated that the proposed rule would be contrary to the legislative intent behind section 208 of the Act, 8 U.S.C. 1158, because Congress contemplated that asylum determinations would be made independent of exclusion and deportation proceedings.

Several comments claimed that the system of discretionary referrals would actually make the process less efficient because applicants would be forced to present their claims in a longer, more formal hearing before an immigration judge. The comments claimed that this would increase overall expense to the Government, exacerbate the problem of delay in asylum adjudications, and undermine the intent of the proposed rule to streamline the asylum system.

The vast majority of the comments directed to this question stated that asylum interviews should be mandatory. However, a large number of these comments also suggested that, as an alternative, direct referral without interview should take place only in circumstances where the written application indicates that the claim is frivolous or manifestly unfounded. Some comments criticized the proposed rule for making it appear that the granting of interviews to asylum applicants will be the exception, not the rule. The comments also stated that applicants deserve to know the standard under which the INS will determine whether or not to grant an interview.

Response and Disposition: The Department has carefully considered these comments and determined that the goal of streamlining asylum adjudications can be met without changing the present rule that mandates the opportunity for an interview of each asylum applicant. Accordingly, the present rule is retained and there is no provision for immediate referral of cases, without an interview, to an immigration judge. The rule is clarified to state that an interview will be granted for applications that are complete within the meaning of § 208.3(c)(5). Section 208.10 also is amended to provide that the failure without good cause of an applicant to appear for a scheduled interview under § 208.9(a) may be deemed to constitute a waiver of the right to an interview with an asylum officer or, in the case of an applicant who is a stowaway, alien crewman, alien temporarily excludable under section 235(c) of the Act, 8 U.S.C. 1225,

or in current lawful immigration status, may be deemed to constitute an abandonment of the application.

b. Procedural Issues

Proposed Rule: The proposed rule would have amended 8 CFR 208.9 (b) and (c) to require the applicant to provide full identifying information at the time of the application. Section 208.9(d) would have been amended to require that, at the conclusion of the interview, the applicant be notified that he or she must appear in person to receive the written decision of the asylum officer. A new section 208.9(g) would have been added to specify rules regarding the use of interpreters during interviews.

Comment: One comment stated that the proposed rule is unclear on whether witnesses could testify at the interview because section 208.9(b) of the rule states that the applicant "may . . . submit affidavits of witnesses" while section 208.9(g) refers to live witnesses.

Response and Disposition: An asylum applicant may present live witness testimony at the time of his or her interview. In the final rule, section 208.9(b) is amended to clarify this point.

Comment: Several comments criticized the requirement in the proposed rule that the applicant be informed that he or she must appear in person to acknowledge receipt of the written decision of the asylum officer. The comments stated that this requirement would be inefficient and would result in applicants having to make an unnecessary return trip to the Asylum Office, where they may have to wait for a long period of time. A comment also questioned whether those who are interviewed in "circuit ride" locations would be able to go to those locations, or would be required to travel to the more distant Asylum Office with jurisdiction over their cases. Several comments suggested that written decisions be served by certified mail or that mail service be used in cases where the applicant has an attorney or registered representative.

Response and Disposition: In order to streamline asylum adjudications, there must be a reliable system to accomplish and verify service of the decision to grant, refer, or deny the claim and, if applicable, service of the charging document. The INS experience with certified mail under the current rule demonstrates that this may not be the most effective method to meet this goal. If the applicant has provided an invalid address or has moved without notifying the INS, delivery most often will not be accomplished. In addition, postal delays and difficulties in processing return

receipt cards detract from the INS's ability to confirm timely delivery. It may be somewhat inconvenient to make a return trip to the Asylum Office; however, under this system, the applicant will receive his or her decision promptly. If the decision is to grant the claim, the applicant will be able to apply more quickly for employment authorization and other benefits. If the decision is to refer the claim, the applicant will receive a charging document that will state the date and time of required appearance in immigration court, and will be able to plan for that proceeding. Finally, both the asylum adjudications and removal proceedings systems will benefit if there are fewer disputes regarding the service of decisions and charging documents. In cases where the applicant has failed to appear at the appointed time to receive his or her decision, certified mail will be used in lieu of personal service to deliver the decision.

The INS has carefully considered whether the rule should be amended to permit the use of mail service in the case of applicants who have an attorney or registered representative. The Department has declined to adopt that proposal at this time, chiefly because of concerns that an attorney retained for the asylum application process may not remain as the applicant's attorney in exclusion or deportation proceedings. However, as this final rule is implemented, the INS will work with attorneys and advocacy organizations to consider this and other proposals relating to service of decisions.

These provisions of the proposed rule have been adopted with an amendment to clarify that an applicant's failure to appear to receive and acknowledge receipt of the decision of the asylum officer shall be treated as delay caused by the applicant for purposes of 8 CFR 208.7(a)(3) and shall extend the period within which the applicant may not apply for employment authorization by the number of days until the applicant does appear to receive the decision or until the applicant appears before an immigration judge in response to the issuance of a charging document under 8 CFR 208.14(b).

Comment: Several comments addressed the proposed rule's provisions governing the use of interpreters (8 CFR 208.9(g)). Some comments criticized the requirement, also contained in current regulations, that the applicant who does not wish to proceed in English provide an interpreter for the asylum interview. These comments stated that this will impose a financial burden on applicants and that it may be difficult for

applicants to find competent interpreters, particularly for certain languages. Other comments recommended that the rule be amended to specifically permit immediate family members to serve as interpreters. Some comments suggested that the rule be more lenient in cases where the applicant has failed to provide an interpreter. One comment stated that the proposed rule should be amended to prohibit representatives, as well as attorneys and immediate family members, from serving as interpreters.

Response and Disposition: The requirement that asylum applicants wishing to proceed in a language other than English provide an interpreter is currently enforced by the INS as an operations policy. Any other rule would impose an undue financial burden on the Government. Currently, asylum applicants may use a family member, friend, or volunteer from the community, or may hire a professional interpreter. The proposed rule was intended to adopt this policy into the regulations. The recommendation that a registered representative, as well as an attorney, be prohibited from serving as an interpreter will be adopted in the final rule; an advocate should not be called upon to serve two distinct roles in the course of a proceeding. However, the final rule does not prohibit an employee of the applicant's attorney or registered representative, such as a paralegal, from serving as the applicant's interpreter. Finally, while an applicant's failure without good cause to provide an interpreter may be considered as a failure without good cause to appear for the asylum interview itself, the asylum officer has discretion in applying this sanction. If the failure to provide an interpreter is justified by good cause, the INS will not consider the applicant to have waived his or her right to an interview or to have abandoned his or her asylum application.

These provisions of the proposed rule are retained with appropriate amendments in the final rule.

10. Failure to Appear (Section 208.10)

New Amendment: The proposed rule would have made no amendment to 8 CFR 208.10. However, in the course of reviewing the comments regarding the interview of asylum applicants, it was concluded that this section should be clarified to modify the provision that an applicant who fails to appear for a scheduled interview may be deemed to have abandoned his or her application for asylum. The final rule will modify this section to provide that failure without good cause to appear for a

scheduled interview may be deemed to constitute a waiver of the right to an interview or, in the case of an alien crewman, stowaway, person excludable under section 235(c) of the Act, 8 U.S.C. 1225, or person in current lawful immigration status, may be deemed to constitute an abandonment of the application. The final rule also will amend 8 CFR 208.14(b) to provide that an applicant who is deemed to have waived the right to his or her asylum interview in accordance with this section may be referred to an immigration judge for adjudication in the course of exclusion or deportation proceedings.

11. Comments From the Department of State (Section 208.11)

Proposed Rule: As amended by the proposed rule, 8 CFR 208.11 would retain the practice of submitting asylum applications to the Department of State but would eliminate the mandatory period during which asylum officers and immigration judges must await the receipt of State Department comments in individual cases. The State Department could provide such comments, but the intent of the rule is to change the role of the State Department to one of providing detailed and current country conditions information.

Comments: Comments supported this change. Several comments stated that applicants should have access to the country conditions information provided by the State Department and relied upon by INS, and that applicants should continue to receive copies of case-specific comments from the State Department. Some comments stated that the applicant should be given 30 days to respond to any such comments from the State Department.

Response and Disposition: Under section 208.11(c) of the rule, applicants will receive copies of case-specific comments provided by the Department of State. Immigration judges will have discretion to grant an appropriate time period, if necessary, for rebuttal. A uniform and mandatory waiting period will not be beneficial because it would add unnecessary delay to the process. Copies of generic country conditions information relied upon by immigration judges also will become part of the record available to the applicant. The INS currently is considering means by which country conditions information used by asylum officers may be made more generally available and will continue to work with attorneys, advocacy groups, and other interested members of the public in accomplishing this goal. This provision of the proposed

rule is adopted in the final rule with amendments to clarify the text and eliminate unnecessary words.

12. Elimination of Notice of Intent to Deny (Section 208.12(a))

Proposed Rule: The proposed rule, section 208.12(a), would have eliminated the requirement that an asylum officer provide the applicant an opportunity to inspect, explain, or rebut the material relied upon to find that the applicant's claim has not been approved. This is commonly referred to as a Notice of Intent to Deny, or NOID.

Comments: Many comments criticized this proposal, arguing that the NOID requirement protects the rights of applicants and promotes more accurate decisions by asylum officers. Comments characterized the NOID as useful to clear up misunderstandings or incorrect applications of the law before cases reach the immigration court. As discussed previously, some comments also felt that the proposed rule would violate the due process rights of applicants by denying them an opportunity to give a meaningful response to material other than the interview and the application relied upon by the asylum officer.

Other comments praised elimination of the NOID requirement as a means to expedite the asylum process. Some comments proposed that a balance be struck by maintaining the NOID requirement but reducing the time period in which the applicant can respond.

Response and Disposition: The Department gives high priority to all efforts to improve the fairness, quality, and accuracy of decisions made by asylum officers and immigration judges. However, the requirements in 8 CFR 208.12(a) are not necessary to meet these goals, and modification of this section is pivotal to the streamlining of the asylum process. Applicants who are not granted asylum by the asylum officer will have a full opportunity to present their claim to an immigration judge, with all the procedural protections of a full adversarial proceeding. This includes, of course, the right to examine and rebut all evidence and materials that are introduced in opposition to the asylum claim. The NOID system is, at best, an imperfect approximation of this hearing process and one that adds unnecessary time and expense to the process, thus making it more difficult to adjudicate claims in a timely manner. The Department has considered seriously the objections stated to this proposal but believes that the interests of all asylum applicants will best be served by eliminating the

NOID requirement. Accordingly, this provision of the proposed rule is retained without amendment in the final rule. The Department will, however, continue to issue Notices of Intent to Deny in the cases of persons whose asylum applications can be denied by asylum officers, including stowaways, crewmen, and persons with a lawful immigration status.

13. Referrals to an Immigration Judge (Section 208.14(b))

Proposed Rule: The proposed rule would have added a new paragraph 208.14(b) to state that if an asylum officer does not grant an application, and the applicant appears to be deportable or excludable, the asylum officer shall refer the application to an immigration judge for adjudication in exclusion or deportation proceedings. The asylum officer would no longer deny the application in writing, as required under current regulations. The asylum officer would issue a written denial in cases where the applicant has a current legal immigration status not derived from his or her asylum application.

Comments: Several comments stated that the rule should be amended to state specific guidelines that asylum officers must follow in deciding whether to refer cases to an immigration judge. According to these comments, it is unclear whether the application will be judged under the standard of well-founded fear of persecution set forth in section 101(a)(42) of the Act, 8 U.S.C. § 1101(a)(42), or under some other discretionary standard. Some comments also stated that asylum officers may rely on improper factors such as instinct, prejudice, or misinformation in making referral decisions. The comments suggested that a written record of the reasons for referral, provided to the applicant, would be fairer to applicants and would increase confidence in the referral system.

Several comments also criticized the provision for automatic referral of the asylum application to an immigration judge. The comments argued that in the course of exclusion or deportation proceedings, the asylum application is defensive in nature, and the applicant should be able to decide whether to use the application in the proceedings. The comments also stated that initial asylum applications are often erroneous or incomplete, not because the applicant intends to commit fraud, but because the applicant does not know English and has used a preparer who did not complete the application correctly. The comments suggested that the applicant

referred to an immigration judge be able to submit an entirely new application.

Response and Disposition: The proposed rule does not change the legal standard for granting asylum set forth in sections 101(a)(42) and 208(a) of the Act, 8 U.S.C. 1101(a)(42) and 1158(a), and 8 CFR 208.13 and 208.14: asylum officers will continue to abide by this standard. Those who have met the burden of proof to establish that they are refugees will continue to be granted asylum. Those who have not met their burden of proof will be referred to an immigration judge or, in the case of those with a current lawful immigration status, will be issued a denial letter. The rule should create no reason for concern that factors other than those set forth in the law and regulations will influence the decisions of asylum officers. Accordingly, there is no reason to provide any additional regulatory guidelines for asylum officer decisions.

We have declined to adopt the recommendation that the applications of referred applicants not be forwarded to an immigration judge. A referred applicant may decline to seek asylum in the course of exclusion or deportation proceedings and, if so, can simply move to withdraw the application. However, if the applicant desires to proceed with the application, he or she should be held accountable for the information that has been provided on the initial application. During the immigration court proceedings, the applicant can provide additional information and explain any errors or inconsistencies in the application. In addition, section 208.2(b) of this rule has been amended to provide that an immigration judge, as a matter of discretion, may permit the applicant to amend the I-589 prior to the hearing on the merits.

The proposed rule would have provided that the INS inform an applicant by letter of the decision to refer his or her case, accompanied by a charging document. The INS will consider the recommendation that the letter state briefly the reasons why the application has not been granted. However, the INS believes that a regulatory standard mandating the contents of the referral letter is not necessary to preserve the procedural rights of applicants and may impede the flexibility that will be necessary to ensure that applicants receive their decisions in a prompt manner. The INS will continue to work with attorneys, advocacy groups, and other interested members of the public on this question.

This provision of the proposed rule will be adopted in the final rule with one substantive amendment. The amendment will specify that an

application may be referred to an immigration judge for adjudication in exclusion or deportation proceedings if, in accordance with 8 CFR 208.10, the applicant is deemed to have waived his or her right to an interview on the application under 8 CFR 208.9(a). In addition, this paragraph has been reorganized and sub-divided for clarity.

14. Eligibility Restrictions for Persons Convicted of Aggravated Felonies (Sections 208.14(d)(4) and 208.16(c)(2)(ii))

Proposed Rule: The proposed rule would have added a new paragraph 208.14(d)(4) that would bar individuals who have been convicted of an aggravated felony from applying for or being granted asylum. Proposed 8 CFR 208.16(c)(2)(ii) would bar such individuals from applying for or being granted withholding of deportation.

Comments: Several comments proposed that this portion of the rule be amended. Some comments stated that the effect of the rule is too harsh and that those convicted of an aggravated felony should be able to present their asylum claims. The INS should then balance the likelihood and seriousness of persecution against the gravity of the crime committed by the individual. These comments stated that this approach is supported by the United Nations High Commissioner for Refugees. Some comments also argued that the rule should apply only to convictions entered after November 19, 1988, the date of enactment of the Anti-Drug Abuse Act of 1988, Pub. L. 100-690, which added section 101(a)(43) to the Act to define "aggravated felony." See 8 U.S.C. 1101(a)(43). These comments argued that application of the aggravated felony ban to convictions entered on or before November 19, 1988, is inconsistent with the holding in *Landgraf v. USI Film Products*, 114 S. Ct. 1483 (1994).

Several comments also criticized the proposed rule for barring persons with aggravated felony convictions from eligibility for withholding of deportation. The comments argued that the preclusion in section 243(h)(2)(B) of the Act, 8 U.S.C. 1253(h)(2)(B), which bars a grant of withholding to a person who, "having been convicted of a particularly serious crime, constitutes a danger to the community," requires a two-pronged finding: that the alien was convicted of a particularly serious crime and that the alien constitutes a danger to the community. The comments stated that the INS should not presume that every aggravated felony is a particularly serious crime or that every person

convicted of such a crime is also a danger to the community.

Response and Disposition: These provisions of the rule are mandated by the congressional enactments regarding limitations on the granting of relief to criminal aliens. The definition of "aggravated felony" in section 101(a)(43) of the Act was added by section 7342 of the Anti-Drug Abuse Act of 1988, Pub. L. 100-690, 102 Stat. 4181, 4469 (November 18, 1988). The Immigration Act of 1990, Pub. L. 101-649, 104 Stat. 4978 (November 29, 1990) (1990 Act) defined additional crimes as aggravated felonies and added further disabling provisions. E.g., 1990 Act § 501, 104 Stat. at 5048. In addition, section 515(a)(1) of the 1990 Act created section 208(d) of the Act, 8 U.S.C. 1158(d), which states that an alien convicted of an aggravated felony "may not apply for or be granted asylum." 104 Stat. at 5053. Section 515(a)(2) of the 1990 Act amended section 243(h)(2) of the Act, 8 USC 1253(h)(2), to require that, for purposes of the statutory bar to withholding of deportation, "an alien who has been convicted of an aggravated felony shall be considered to have committed a particularly serious crime." 104 Stat. at 5053.

Neither section 208(d) nor section 243(h)(2) of the Act provides for a "balancing test" to be employed in the case of a person convicted of an aggravated felony. Such a person is barred from relief without regard to the merits of his or her claim. Inclusion of aggravated felonies as "particularly serious crimes" also is consistent with the long-standing administrative interpretation of the Act that crimes such as armed robbery, robbery, burglary, embezzlement, and possession for sale of cocaine and heroin are "particularly serious crimes." Moreover, the Attorney General, through the Board of Immigration Appeals, consistently has held that section 243(h)(2)(B) compels the finding that an alien constitutes a danger to the community if he or she has been convicted of a particularly serious crime. *Matter of A-A-*, Interim Dec. 3176 (BIA 1992); *Matter of K-*, Interim Dec. 3163 (BIA 1991); *Matter of Carballe*, 19 I&N Dec. 357 (BIA 1986), modified on other grounds, *Matter of Gonzalez*, 19 I&N Dec. 682 (BIA 1988). Federal courts have affirmed this position. See, e.g., *Crespo-Gomez v. Richard*, 780 F.2d 932 (11th Cir. 1986); *Ramirez-Ramos v. INS*, 814 F.2d 1394 (9th Cir. 1987).

To the extent these provisions have a retroactive effect, such effect clearly was intended by Congress and thus is permissible. *Landgraf*, 114 S.Ct. at 1496. In enacting section 7342 of the Anti-

Drug Abuse Act of 1988, Congress defined certain crimes as aggravated felonies without regard to the date of conviction. Section 515(b) of the 1990 Act was amended by the Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Pub. L. 102-232, December 12, 1991, 105 Stat. 1733, 1752, to mandate that the statutory bar in section 208(d) of the Act applies to convictions entered before, on, or after November 29, 1990, the effective date of the 1990 Act, and applies to all applications for asylum made on or after the same date. Congress also expressly limited the application of certain disabling provisions (e.g., the deportation ground under section 241(a)(4) of the Act and the ineligibility for voluntary departure under section 244(e) of the Act), to an alien "convicted, on or after the date of enactment of [the 1988] Act, of an aggravated felony." Pub. L. 100-690 §§ 7343(c) and 7344(b), 102 Stat. at 4470, 4471. If the term "aggravated felony" were to be interpreted to apply only to convictions occurring on or after November 18, 1988, then the prospective language that placed limits on the retroactivity of specific sections of the 1988 Act would be redundant, in violation of the maxim that no provision of a law should be construed to render a word or clause surplus. *Matter of A-A-*, Interim Dec. 3176 (BIA 1992) at 8-10 and n.13.

It is clear that Congress intended to prohibit an alien who has been convicted of an aggravated felony from applying for or being granted asylum or withholding of deportation. Therefore, these provisions of the proposed rule are adopted without amendment in the final rule.

15. Discretionary Denial of Asylum (Section 208.14(e))

Proposed Rule: The proposed rule would have added a new section 208.14(e) to provide that an applicant who is otherwise eligible may be denied asylum in the discretion of the Attorney General if the applicant can and will be deported or returned to a country in which the applicant would not face harm or persecution and would have access to a full and fair asylum procedure, in accordance with bilateral or multilateral arrangements with the United States governing such matters.

Comments: A few comments endorsed this proposal. One comment noted that the proposed rule would prevent "country shopping" and encourage potential refugees to seek protection in the first country of refuge. Another comment agreed that the proposed rule will be beneficial, provided that a treaty

or other formal agreement designate the "safe country." Another comment recommended that the proposed rule be amended to prohibit an asylum application from a person applying for admission at a Port of Entry and who departed for the United States or is coming from a country which is signatory to either the 1951 Convention or the 1967 United Nations Protocol Relating to the Status of Refugees, and in which the alien would not face harm or persecution and would have access to a full and fair procedure for determining his or her asylum claim.

However, most comments opposed giving asylum officers and immigration judges the authority to deny asylum as a matter of discretion on this ground to an otherwise qualified applicant. Several comments claimed that these provisions do not establish acceptable standards for refugee safety or due process in the receiving country, and thus do not fulfill the requirements for a proposed rule under the Administrative Procedure Act. Another comment warned that the ability to determine what is a fair procedure for asylum should not be left to the discretion of governmental agencies where political considerations may play a large role.

A number of comments stated that refugees have the right to seek protection in the country of choice and that many asylum-seekers choose the United States because the countries through which they travel do not offer adequate protection from discrimination or home-country persecutors. Comments also argued that applicants may be deported to a country in which they had never been present. Furthermore, courts have held that an asylum-seeker may not be deported to a third country where there are no assurances that the asylum seeker would not be indirectly returned to the persecuting country, citing *Amanullah v. Cobb*, 862 F.2d 362 (1st Cir. 1988), vacated as moot, 872 F.2d 11 (1st Cir. 1989). Under the proposed rule, an asylee also would be required to obtain travel documents from his or her country of origin, which might endanger the applicant or the applicant's family.

Other comments questioned how the United States would ascertain that the asylee would be protected in the "safe country." One comment advocated that a careful and open review be conducted to determine that procedures in the designated first country of asylum are carried out in the same manner and with the same safeguards as asylum determinations made within the United States. In addition, this commenter suggested, there should be verifiable assurances that the denied applicant

will be treated by the "safe country" in a manner consistent with United States legal obligations. Other comments expressed the opinion that a "safe country" may forcibly repatriate an asylee to the country of persecution or that the asylee will be transferred from country to country. Several comments stated that current rules regarding "firm resettlement" adequately prevent forum shopping.

Other comments recommended modifications to the proposed rule. One comment advocated that additional factors such as the presence of family members in the United States, the applicant's ties (if any) to the receiving country, and whether the applicant has a criminal record, be used to determine whether or not to exercise the discretion to deny. Another comment stated that only immigration judges should be authorized to deny asylum under the proposed rule because only they have the power to order aliens deported.

Response and Disposition: These comments have been considered carefully. It must be emphasized that the discretionary authority referred to in this provision is contingent upon bilateral or multilateral agreements with other nations, and that no such agreements now exist. In the absence of such agreements, discretionary authority under this section cannot be exercised. Prior to the implementation of any such agreement by the Department, public notice will be provided. The Department is satisfied that the basic standard set forth in this section is sufficient to protect the rights and interests of persons entitled to protection from persecution in the event that the United States enters such an agreement. In the meantime, most of the concerns presented in the comments relate to how the discretionary authority would be exercised. These concerns and others will be taken into account if and when a bilateral or multilateral agreement on this subject is made. This provision is retained in the final rule with an amendment to clarify that the alien may be returned only to a country through which the alien actually traveled en route to the United States.

16. Issuance of Employment Authorization to Asylees (Section 208.20)

Proposed Rule: The proposed rule would have amended section 208.20 to provide that a person granted asylum who desires to work shall receive an employment authorization document (EAD) expeditiously upon application to the INS.

Comments: A comment stated that an asylee should not be required to apply

for an EAD, but should be issued an EAD along with notification of the asylum decision.

Response and Disposition: The proposed amendments to section 208.20 are designed to ensure that asylees receive their EAD promptly upon application. They do not create new requirements or obstacles for asylees seeking authorization to work. Asylees are among the categories of persons who are eligible for employment incident to their status but must nevertheless apply for an employment authorization document. 8 CFR 274a.12(a)(5). Among others in this category are those aliens who are admitted as refugees, granted withholding of deportation, or granted Temporary Protected Status. Since authorization for employment is a discretionary immigration benefit, the INS will continue to require that persons in these categories file a separate application for an EAD. Accordingly, this provision of the proposed rule will be retained in the final rule with an amendment for clarity.

17. Aliens in Exclusion or Deportation Proceedings (Sections 236.3(a) and 242.17(c)(2))

Proposed Rule: These provisions require that in the case of an alien in exclusion or deportation proceedings who expresses a fear of harm or persecution upon return to his or her country of origin or country of deportation, the immigration judge shall advise the alien that he or she may apply for asylum or withholding of deportation and shall make available the appropriate application forms. The proposed rule would have amended these provisions to exempt situations where the alien already has filed an asylum application and that application has been referred to the immigration judge in accordance with the proposed amendments to 8 CFR 208.14(b).

Comments: Several comments, all of which also criticized the direct referral of asylum applications under 8 CFR 208.14(b), stated that there should be no exception for situations where an asylum applicant has been referred to an immigration judge. The comments argued that as a result of this change, referred asylum applicants will receive less procedural protection than other persons in removal proceedings.

Response and Disposition: These changes do not deny any substantive procedural protection to asylum applicants. An applicant referred under 8 CFR 208.14(b) already has made an application for asylum, and thus need not be advised of a right he or she has exercised. Referred applicants will

enjoy all the procedural rights accorded to other persons in proceedings before an immigration judge. Accordingly, these provisions of the proposed rule are adopted in the final rule, with section 236.3(a) amended for clarity.

18. Use of Information in Application to Establish Deportability (Section 242.17(e))

Proposed Rule: The proposed rule would have amended section 242.17(e) to expressly permit the INS to use information supplied in an application for asylum as the basis for issuance of an Order to Show Cause under 8 CFR 242.1 and thus initiate deportation proceedings.

Comments: A few comments criticized this amendment, stating that it violates confidentiality by exposing the claims of applicants in immigration court and violates due process by shifting the burden of proof to establish deportability away from the INS. The comments stated that this subsection would be an obstacle to the right to apply for asylum because if the applicant's claim is denied, he or she faces immediate deportation based on evidence provided in the application. Some deserving applicants will avoid this risk and choose not to apply.

Response and Disposition: This aspect of the proposed rule is necessary to promptly refer cases to an immigration judge for decision. Often, the asylum application is the only source of information available to the Service to initiate proceedings before the immigration judge. Persons who choose not to file asylum applications for this reason may forego their opportunity for consideration of their claim by an asylum officer; if they are apprehended by the INS and placed directly in proceedings, the immigration judge will have exclusive jurisdiction over their cases. Immigration regulations need not be designed to protect the ability of a person to remain unlawfully in the United States without detection.

At the advice of the public, this provision will be amended for clarity to provide that it applies to applications for asylum or withholding of deportation filed on or after January 4, 1995.

The final rule will further amend section 242.17(e) to state that an application made under section 242.17 may constitute an admission of alienage or deportability if the alien has been properly served with notice of the hearing before an immigration judge even in cases in which the applicant has failed without excuse to appear for the hearing. This amendment is necessary to enable the entry of orders of

deportation against aliens who are not lawfully present in the United States, have been properly served with an Order to Show Cause, and fail to appear for their hearing.

19. Employment Authorization for Persons in Proceedings (Section 274a.12(c)(13))

Proposed Rule: The proposed rule would eliminate 8 CFR 274a.12(c)(13), which provides that a person in exclusion or deportation proceedings who is not detained and not subject to a final order of deportation may apply for employment authorization.

Comments: Several comments opposed this change on the ground that persons in deportation proceedings who have filed no applications for relief, but who contest their exclusion or deportation on other grounds, will have no other basis to obtain employment authorization and support themselves.

Response and Disposition: As stated in the supplementary information to the proposed rule, virtually all persons who are not detained and are subject to exclusion or deportation proceedings are eligible to apply for employment authorization under other provisions of 8 CFR 274.12(c). Retaining this paragraph would be inconsistent with the intent of this rule to limit access to employment authorization to asylum applicants whose cases are granted or whose cases are not decided promptly. Accordingly, this portion of the proposed rule is adopted without amendment in the final rule.

20. Fee for Applications for Employment Authorization (Section 274a.13)

Proposed Rule: The proposed rule would have amended section 274a.13 to provide that an applicant for employment authorization under section 274a.12(c)(8) (relating to asylum applicants) must pay a fee upon both the initial application and applications for renewal of work authorization.

Comments: Numerous comments criticized the proposal for imposing a filing fee upon asylum applicants. These comments are summarized under heading 4. We consider these comments to be directed as well to the proposal to charge a filing fee for initial applications for employment authorization.

Response and Disposition: The Department has determined that the final rule will require payment of a fee only upon application for replacement or renewal of an employment authorization document. This is consistent with the decision not to charge a fee for the filing of an application for asylum. It also is

reasonable to charge a renewal fee to those who have previously been granted employment authorization. As part of an ongoing comprehensive economic analysis of its entire fee structure, the INS will examine alternative sources of funding for employment authorization adjudications, including the possibility of a user fee.

In accordance with 5 U.S.C. 605(b), the Attorney General certifies that this rule will not have a significant adverse economic impact on a substantial number of small entities, based upon the following factors. This rule principally affects the adjudication of individual claims for asylum and withholding of deportation and thus would have no significant economic impact on small businesses, organizations, or state or local governmental agencies. The amendments to regulations concerning the issuance and renewal of employment authorization documents could have a small and indirect impact upon business entities by withholding employment authorization in certain cases.

The Department of Justice considers this rule to be a "significant regulatory action" under section 3(f) of Executive Order 12866, and accordingly submitted this rule to the Office of Management and Budget for review.

The proposed rule will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 12612, it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

The Attorney General has reviewed this rule in light of section 2(c) of Executive Order 12778 and finds that the rule meets the applicable standards provided in section 2(b) of the order.

The information collection requirements contained in this rule have been submitted to the Office of Management and Budget under the provisions of the Paperwork Reduction Act. Clearance numbers for these collections are contained in 8 CFR 299.5, Display of Control Numbers.

The interim rule's amendments to 8 CFR 208.3(a) and 208.4(a) are superseded by amendments made by this final rule. The interim rule's amendments to 8 CFR 208.4(b) are adopted without amendment as part of this final rule.

List of Subjects

8 CFR Part 208

Administrative practice and procedure, Aliens, Immigration, Reporting and recordkeeping requirements.

8 CFR Part 236

Administrative practice and procedure, Aliens, Immigration.

8 CFR Part 242

Administrative practice and procedure, Aliens.

8 CFR Part 274a

Administrative practice and procedure, Aliens, Employment, Penalties, Reporting and recordkeeping requirements.

8 CFR Part 299

Immigration, Reporting and recordkeeping requirements.

Accordingly, chapter I of title 8 of the Code of Federal Regulations is amended as follows:

PART 208—PROCEDURES FOR ASYLUM AND WITHHOLDING OF DEPORTATION

1. The authority citation for part 208 continues to read as follows:

Authority: 8 U.S.C. 1103, 1158, 1226, 1252, 1282; 31 U.S.C. 9701; 8 CFR part 2.

2. Section 208.1 is amended by:
 - a. Revising in paragraph (a) the first sentence;
 - b. Removing in paragraph (a), in the second and fourth sentences, the phrase "October 1, 1990" and adding in its place "January 4, 1995";
 - c. Adding to paragraph (a) a new sentence at the end of the paragraph;
 - d. Revising in paragraph (b) the second sentence; and
 - e. Removing in paragraph (c) the phrase "assist the Deputy Attorney General and the Director of the Asylum Policy and Review Unit, in coordination" and adding in its place the word "coordinate", to read as follows:

§ 208.1 General.

(a) This part shall apply to all applications for asylum or withholding of deportation, whether before an asylum officer or an immigration judge, that are filed on or after January 4, 1995 or pending as of January 4, 1995. * * * The provisions of this part relating to a person convicted of an aggravated felony, as defined in section 101(a)(43) of the Act, 8 U.S.C. 1101(a)(43), shall apply to applications for asylum or withholding of deportation that are filed on or after November 29, 1990.

(b) * * * These shall include a corps of professional asylum officers who are to receive special training in international human rights law, conditions in countries of origin, and other relevant national and international refugee laws. * * *

* * * * *

3. Section 208.2 is amended by:

a. Removing in paragraph (a) the second sentence and adding in its place three new sentences; and

b. Removing in paragraph (b) the second and third sentences and adding in their place three new sentences, to read as follows:

§ 208.2 Jurisdiction.

(a) * * * An application that is complete within the meaning of § 208.3(c)(5) shall be either adjudicated or referred by asylum officers under this part in accordance with § 208.14. With the exception of cases involving crewmen, stowaways, or aliens temporarily excluded under section 235(c) of the Act, 8 U.S.C. 1225(c), which are within the jurisdiction of an asylum officer pursuant to § 253.1(f) of this chapter, an asylum officer shall not decide whether an alien is entitled to withholding of deportation under section 243(h) of the Act, 8 U.S.C. 1253(h). An application that is incomplete within the meaning of § 208.3(c)(5) shall be returned to the applicant.

(b) * * * The immigration judge shall make a determination on such claims. In cases where the adjudication of an application has been referred in accordance with § 208.14, that application shall be forwarded with the charging document to the Office of the Immigration Judge by the Asylum Office. As a matter of discretion, the immigration judge may permit the applicant to amend the application, but any delay caused by such a request shall extend the period within which the applicant may not apply for employment authorization in accordance with § 208.7(a).

4. Section 208.3 is amended by revising paragraph (a) and adding a new paragraph (c), to read as follows:

§ 208.3 Form of application.

(a) An application for asylum or withholding of deportation shall be made on Form I-589 (Application for Asylum and for Withholding of Deportation) and shall be submitted, together with any additional supporting material, in triplicate, meaning the original plus two copies. The applicant's spouse and children as defined in section 101 of the Act, 8 U.S.C. 1101(a)(35) and 1101(b)(1), may

be included on the application if they are in the United States. One additional copy of the principal applicant's I-589 must be submitted for each dependent listed on the principal's application. An application shall be accompanied by one completed Form FD-258 (Fingerprint Card) for every individual included on the application who is 14 years of age or older. Forms I-589 and FD-258 are available from the INS and from the Offices of Immigration Judges. The application for asylum or withholding of deportation also shall be accompanied by a total of two photographs of each applicant and two photographs of each dependent included on the application.

* * * * *

(c) The application (Form I-589) shall be filed under the following conditions and shall have the following consequences, as shall be noted in the instructions on the application:

(1) Information provided in completing the application may be used as a basis for the institution of, or as evidence in, exclusion proceedings in accordance with part 236 of this chapter or deportation proceedings in accordance with part 242 of this chapter;

(2) Information provided in the application may be used to satisfy the burden of proof of the INS in establishing the applicant's deportability under part 242 of this chapter;

(3) Mailing to the address provided by the applicant on the application or the last change of address form (INS Form AR-11), if any, received by the INS shall constitute adequate service of all notices or other documents, except a Notice to Alien Detained for Hearing by an Immigration Judge (Form I-122), service of which is governed by § 235.6 of this chapter, and an Order to Show Cause (Form I-221), service of which is governed by section 242B(a)(1) of the Act, 8 U.S.C. 1252b(a)(1);

(4) The applicant and anyone other than an immediate relative who assists the applicant in preparing the application must sign the application under penalty of perjury. The applicant's signature is evidence that the applicant is aware of the contents of the application. A person other than an immediate relative who assists the applicant in preparing the application also must provide his or her full mailing address;

(5) An application for asylum and for withholding of deportation that does not include a response to each of the questions contained in the Form I-589, that is unsigned, or that is

unaccompanied by the required materials specified in paragraph (a) of this section is incomplete. An application that is incomplete shall be returned by mail to the applicant within 30 days of the receipt of the application by the INS. The filing of an incomplete application shall not commence the 150-day period after which the applicant may file an application for employment authorization in accordance with § 208.7(a)(1). If an application has not been mailed to the applicant within 30 days, it shall be deemed complete; and

(6) Knowing placement of false information on the application may subject the person placing that information on the application to criminal penalties under title 18 of the United States Code and to civil penalties under section 274C of the Act, 8 U.S.C. 1324c. 5. Section 208.4 is amended by revising paragraph (a) to read as follows:

§ 208.4 Filing the application.

* * * * *

(a) *With the Service Center by mail.* Except as provided in paragraphs (b) and (c) of this section, applications for asylum or withholding of deportation shall be filed directly by mail with the Service Center servicing the Asylum Office with jurisdiction over the place of the applicant's residence or, in the case of an alien without a United States residence, the applicant's current lodging or the land border port of entry through which the alien seeks admission to the United States. The addresses of the Service Centers shall be made available through the local INS Information Unit. Upon receipt of the application, except in the case of an alien who has been convicted of an aggravated felony, the Service Center shall forward a copy of the application to the Department of State.

* * * * *

6. Section 208.7 is amended by:

- Revising the section heading;
- Revising paragraph (a);
- Revising in paragraph (b) the introductory text;
- Adding a new paragraph (b)(3);
- Removing, wherever it appears in the introductory text to paragraph (c), the phrase "Asylum Officer" and adding in its place the phrase "asylum officer";
- Removing, wherever it appears in the introductory text to paragraph (c), the phrase "District Director" and adding in its place the phrase "district director";
- Removing in the introductory text to paragraph (c) the phrase "Immigration Judge" and adding in its place the phrase "immigration judge";

h. Removing in paragraph (c)(1) the phrase "before the Immigration Judge" and adding in its place the phrase "before the immigration judge";

i. Removing in paragraph (c)(2) the phrase "by the Immigration Judge" and adding in its place the phrase "by the immigration judge"; and

j. Removing in paragraph (d) the word "sixty" and adding in its place "ninety", to read as follows:

§ 208.7 Employment authorization.

(a) (1) An applicant for asylum who has not been convicted of an aggravated felony shall be eligible pursuant to §§ 274a.12(c)(8) and 274a.13(a) of this chapter to submit an Application for Employment Authorization (Form I-765). The application shall be submitted no earlier than 150 days after the date on which a complete application for asylum submitted in accordance with §§ 208.3 and 208.4 of this part has been received. If an application for asylum has been returned as incomplete in accordance with § 208.3(c)(5), the 150-day period will commence upon receipt by the INS of a complete application for asylum. An applicant whose application for asylum has been denied by an asylum officer or by an immigration judge within the 150-day period shall not be eligible to apply for employment authorization. After the expiration of the 150-day period, the INS shall have 30 days from the date of filing of an initial application for employment authorization to grant or deny that application. If the INS fails to adjudicate the asylum application within that period, the alien shall be eligible for interim employment authorization under this chapter. If an application for asylum is denied by an immigration judge or an asylum officer within the 30-day period, but prior to a decision on the application for employment authorization, the application for employment authorization shall be denied.

(2) An applicant who has been convicted of an aggravated felony shall not be granted employment authorization. In cases where an applicant has previously received employment authorization and his or her application for asylum or withholding of deportation is denied because the applicant has been convicted of an aggravated felony, the employment authorization shall terminate as of the date of the denial.

(3) For purposes of this paragraph (a), the time periods within which the alien may not apply for employment authorization and within which the INS must respond to any such application shall begin when the alien has filed a

complete asylum application in accordance with §§ 208.3 and 208.4. Any delay requested or caused by the applicant shall not be counted as part of these time periods. Such time periods also shall be extended by the equivalent of the time between issuance of a request for evidence under § 103.2(b)(8) of this chapter and the receipt of the applicant's response to such request.

(4) An applicant who fails without good cause to appear for a scheduled interview before an asylum officer or a hearing before an immigration judge shall not be granted employment authorization pursuant to § 274a.12(c)(8) of this chapter.

(5) The provisions of paragraphs (a) (1), (3), and (4) of this section shall apply to persons who have filed an application for asylum or withholding of deportation on or after January 4, 1995.

(b) Subject to the restrictions in paragraph (b)(3) of this section, employment authorization shall be renewable, in increments to be determined by the Commissioner, for the continuous period of time necessary for the asylum officer or immigration judge to decide the asylum application and, if necessary, for final adjudication of any administrative or judicial review.

(3) If an application for asylum filed on or after November 29, 1990 is denied pursuant to § 208.14(c)(4) or § 208.16(c)(2)(ii) because the applicant has been convicted of an aggravated felony, any employment authorization previously issued under § 208.7(a) shall automatically terminate as of the date of the denial.

7. Section 208.8 is revised to read as follows:

§ 208.8 Limitations on travel outside the United States.

An applicant who leaves the United States pursuant to advance parole granted under 8 CFR 212.5(e) shall be presumed to have abandoned his application under this section if he returns to the country of claimed persecution unless the applicant is able to establish compelling reasons for such return.

8. Section 208.9 is amended by:

a. Revising paragraphs (a), (b), (c), (d), and (e);

b. Removing from paragraph (f) the phrase "Bureau of Human Rights and Humanitarian Affairs of the" and the phrase "the Asylum Policy and Review Unit of the Department of Justice,"; and

c. Adding a new paragraph (g), to read as follows:

§ 208.9 Interview and procedure.

(a) For each application for asylum or withholding of deportation that is complete within the meaning of § 208.3(c)(5) and that is within the jurisdiction of the Office of Refugees, Asylum, and Parole, an interview shall be conducted by an asylum officer, either at the time of the application or at a later date to be determined by the Asylum Office. Applications within the jurisdiction of an immigration judge are to be adjudicated under the rules of procedure established by the Executive Office for Immigration Review in parts 3, 236, and 242 of this chapter.

(b) The asylum officer shall conduct the interview in a nonadversarial manner and, at the request of the applicant, separate and apart from the general public. The purpose of the interview shall be to elicit all relevant and useful information bearing on the applicant's eligibility for the form of relief sought. At the time of the interview, the applicant must provide complete information regarding his or her identity, including name, date and place of birth, and nationality, and may be required to register this identity electronically or through any other means designated by the Attorney General. The applicant may have counsel or a representative present, may present witnesses, and may submit affidavits of witnesses and other evidence.

(c) The asylum officer shall have authority to administer oaths, verify the identity of the applicant (including through the use of electronic means), verify the identity of any interpreter, present and receive evidence, and question the applicant and any witnesses.

(d) Upon completion of the interview, the applicant or his representative shall have an opportunity to make a statement or comment on the evidence presented. The asylum officer, in his or her discretion, may limit the length of such statement or comment and may require their submission in writing. Upon completion of the interview, the applicant shall be informed that he or she must appear in person to receive and to acknowledge receipt of the decision of the asylum officer and any other accompanying material at a time and place designated by the asylum officer. An applicant's failure to appear to receive and acknowledge receipt of the decision shall be treated as delay caused by the applicant for purposes of § 208.7(a)(3) and shall extend the period within which the applicant may not apply for employment authorization by the number of days until the applicant does appear to receive and acknowledge

receipt of the decision or until the applicant appears before an immigration judge in response to the issuance of a charging document under § 208.14(b).

(e) The asylum officer shall consider evidence submitted by the applicant together with his or her asylum application, as well as any evidence submitted by the applicant before or at the interview. As a matter of discretion, the asylum officer may grant the applicant a brief extension of time following an interview during which the applicant may submit additional evidence. Any such extension shall extend by equivalent time the periods specified by § 208.7 for the filing and adjudication of employment authorization applications.

(g) An applicant unable to proceed with the interview in English must provide, at no expense to the INS, a competent interpreter fluent in both English and the applicant's native language. The interpreter must be at least 18 years of age. Neither the applicant's attorney or representative of record nor a witness testifying on the applicant's behalf may serve as the applicant's interpreter. Failure without good cause to comply with this paragraph may be considered a failure without good cause to appear for the interview for purposes of § 208.10.

9. Section 208.10 is amended by:

- a. Revising the first sentence; and
- b. Removing, wherever it appears in the second and third sentences, the phrase "Asylum Officer" and adding in its place the phrase "asylum officer", to read as follows:

§ 208.10 Failure to appear.

The failure without good cause of an applicant to appear for a scheduled interview under § 208.9(a) may be deemed to constitute a waiver of the right to an interview with an asylum officer or, in the case of an alien crewman, stowaway, alien temporarily excludable under section 235(c) of the Act, 8 U.S.C. 1225, or alien currently in lawful immigration status, may be deemed to constitute an abandonment of the application. * * *

10. Section 208.11 is revised to read as follows:

§ 208.11 Comments from the Department of State.

(a) At its option, the Department of State may provide detailed country conditions information addressing the specific conditions relevant to eligibility for refugee status according to the grounds specified in section 101(a)(42) of the Act, 8 U.S.C. 1101(a)(42). Any such information relied upon by an

immigration judge in deciding a claim for asylum or withholding of deportation shall be made part of the record and the parties shall be provided an opportunity to review and respond to such information prior to the issuance of a decision.

(b) At its option, the Department of State also may comment on an application it receives pursuant to § 208.4(a), § 236.3, or § 242.17 of this chapter by providing:

(1) An assessment of the accuracy of the applicant's assertions about conditions in his or her country of nationality or habitual residence and his or her particular situation;

(2) Information about whether persons who are similarly situated to the applicant are persecuted in his or her country of nationality or habitual residence and the frequency of such persecution;

(3) Such other information as it deems relevant.

(c) Asylum officers and immigration judges may request specific comments from the Department of State regarding individual cases or types of claims under consideration, or such other information as they deem appropriate. Any such comments shall be made part of the record. Unless the comments are classified under Executive Order 12356 (3 CFR, 1982 Comp., p. 166), the applicant shall be provided an opportunity to review and respond to such comments prior to the issuance of an adverse decision.

§ 208.12 [Amended]

11. In § 208.12, paragraph (a) is amended by:

- a. Removing the phrase "the Asylum Policy and Review Unit,";
- b. Removing the phrase "Asylum Officer" and adding in its place the phrase "asylum officer";
- c. Removing the phrase "District Director" and adding in its place the phrase "district director"; and
- d. Removing the second sentence.

§ 208.13 [Amended]

12. § 208.13 is amended by:

- a. Removing in paragraph (b)(1)(ii), the last sentence, the citation "§ 208.14(c)" and adding in its place the citation "§ 208.14(d)";
- b. Removing in paragraph (b)(2)(ii) the phrase "Asylum Officer" and adding in its place the phrase "asylum officer"; and
- c. Removing in paragraph (b)(2)(ii) the phrase "Immigration Judge" and adding in its place the phrase "immigration judge".

13. Section 208.14 is amended by:

- a. Revising the section heading;

b. Removing in paragraph (a) the phrase "Immigration Judge" and adding in its place the phrase "immigration judge";

c. Removing in paragraph (a) the words "or Asylum Officer";

d. Removing in paragraph (a) the phrase "paragraph (c)" and adding in its place the phrase "paragraph (d)";

e. Removing in paragraph (b) the phrase "paragraph (c)" and adding in its place the phrase "paragraph (d)";

f. Redesignating paragraphs (b) and (c) as paragraphs (c) and (d) respectively;

g. Adding a new paragraph (b);

h. Removing in redesignated paragraph (d)(2) the word "or" at the end of the paragraph;

i. Removing in redesignated paragraph (d)(3) the "," at the end of the paragraph and adding in its place " or";

j. Adding a new paragraph (d)(4); and

k. Adding a new paragraph (e), to read as follows:

§ 208.14 Approval, denial, or referral of application.

(b) (1) An asylum officer may grant asylum in the exercise of discretion to an applicant who qualifies as a refugee under section 101(a)(42) of the Act, 8 U.S.C. 1101(a)(42), unless otherwise prohibited by paragraph (d) of this section.

(2) In the case of an alien (other than a crewman, stowaway, or alien temporarily excluded under section 235(c) of the Act, 8 U.S.C. 1225(c)) who shall appear to be deportable under section 241 of the Act, 8 U.S.C. 1251, or excludable under section 212 of the Act, 8 U.S.C. 1182, the asylum officer shall either grant asylum or refer the application to an immigration judge for adjudication in deportation or exclusion proceedings commenced in accordance with part 236 or part 242 of this chapter. An asylum officer may refer such an application after an interview conducted in accordance with § 208.9 or if, in accordance with § 208.10, the applicant is deemed to have waived his or her right to an interview.

(3) In the case of a crewman, stowaway, or alien temporarily excluded under section 235(c) of the Act, 8 U.S.C. 1225(c), the asylum officer may grant or deny asylum in accordance with the procedures set forth in § 253.1(f) of this chapter. In addition, where an application filed by such a person is not granted, the asylum officer shall issue a Notice of Intent to Deny to the applicant stating the reasons why the application would be denied. The applicant shall be given a period not less than 10 days to rebut the Notice of Intent to Deny.

(4) In the case of a person other than described in paragraphs (b) (2) and (3) of this section, the asylum officer may grant or deny asylum.

(5) No application for asylum or withholding of deportation shall be subject to denial under the authority contained in § 103.2(b) of this chapter.

* * *

(d) * * *

(4) The alien has been convicted of an aggravated felony, as defined in section 101(a)(43) of the Act, 8 U.S.C. 1101(a)(43).

(e) *Discretionary denials.* An application from an alien may be denied in the discretion of the Attorney General if the alien can and will be deported or returned to a country through which the alien traveled en route to the United States and in which the alien would not face harm or persecution and would have access to a full and fair procedure for determining his or her asylum claim in accordance with a bilateral or multilateral arrangement with the United States governing such matter.

14. § 208.16 is amended by:

a. Revising paragraph (a);

b. Removing in paragraph (b)(4) the phrase "Asylum Officer" and adding in its place the phrase "asylum officer";

c. Removing in paragraph (b)(4) the phrase "Immigration Judge" and adding in its place the phrase "immigration judge"; and

d. Revising paragraph (c)(2)(ii), to read as follows:

§ 208.16 Entitlement to withholding of deportation.

(a) *Consideration of application for withholding of deportation.* With the exception of cases that are within the jurisdiction of an asylum officer pursuant to § 253.1(f) of this chapter, an asylum officer shall not decide whether an alien is entitled to withholding of deportation under section 243(h) of the Act, 8 U.S.C. 1253(h). If the application for asylum is granted, no decision on withholding of deportation will be made unless and until the grant of asylum is later revoked or terminated, and exclusion or deportation proceedings at which a new request for withholding of deportation is made are commenced. In such proceedings, an immigration judge may adjudicate both a renewed asylum claim and a request for withholding of deportation simultaneously whether or not asylum is granted.

* * *

(c) * * *

(2) * * *

(ii) The alien, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States. An

alien who has been convicted of an aggravated felony shall be considered to have committed a particularly serious crime and to constitute a danger to the community of the United States;

* * *

15. Section 208.17 is revised to read as follows:

§ 208.17 Decision.

The decision of an asylum officer to grant or to deny asylum or withholding of deportation, or to refer an application in accordance with § 208.14(b), shall be communicated in writing to the applicant, to the Assistant Commissioner, Refugees, Asylum, and Parole, and to the district director having jurisdiction over the place of the applicant's residence or over the port of entry from which the applicant sought admission to the United States. A letter communicating denial of the application shall state why asylum or withholding of deportation was denied. The letter also shall contain an assessment of the applicant's credibility, unless the application was denied pursuant to § 208.14(d)(4) or § 208.16(c)(2)(ii).

Pursuant to § 208.9(d), an applicant must appear in person to receive and to acknowledge receipt of the decision.

16. In § 208.18, paragraphs (a) and (b) are revised to read as follows:

§ 208.18 Review of decisions and appeal.

(a) The Assistant Commissioner, Office of Refugees, Asylum, and Parole, may review decisions by asylum officers. Parties shall have no right of appeal to or right to appear before the Assistant Commissioner in the course of such review.

(b) Except as provided in § 253.1(f) of this chapter, there shall be no appeal from a decision of an asylum officer. In a case referred to an immigration judge in accordance with § 208.14(b), the supervisory asylum officer, pursuant to the authority set forth in §§ 235.6(a) and 242.1(a) of this chapter, shall issue respectively a Notice to Applicant for Admission Detained for Hearing Before Immigration Judge (Form I-122) or an Order to Show Cause (Form I-221).

* * *

17. Section 208.20 is revised to read as follows:

§ 208.20 Approval and employment authorization.

An alien granted asylum and eligible derivative family members are authorized to be employed in the United States pursuant to § 274a.12(a)(5) of this chapter and if intending to be employed, must apply to the INS for a document evidencing such

authorization. The INS shall issue such document within 30 days of the receipt of the application therefor.

18. Section 208.21 is amended by:

a. Revising the introductory text in paragraph (a);

b. Redesignating paragraph (a)(3) as paragraph (a)(4);

c. Removing at the end of paragraph (a)(2) the word "or"; and

d. Adding a new paragraph (a)(3), to read as follows:

§ 208.21 Admission of asylee's spouse and children.

(a) *Eligibility.* A spouse, as defined in section 101(a)(35) of the Act, 8 U.S.C. 1101(a)(35), or child, as defined in section 101(b)(1)(A), (B), (C), (D), (E), or (F) of the Act, 8 U.S.C. 1101(b)(1)(A), (B), (C), (D), (E), or (F), also may be granted asylum if accompanying or following to join the principal alien who was granted asylum, unless it is determined that:

* * *

(3) The spouse or child has been convicted of an aggravated felony, as defined in section 101(a)(43) of the Act, 8 U.S.C. 1101(a)(43); or

* * *

19. Section 208.24 is amended by:

a. Revising the heading and introductory text in paragraph (a);

b. Revising the introductory text in paragraph (b);

c. Revising paragraph (c);

d. Removing in paragraph (a)(3) the citation "208.14(c)" and adding in its place the citation "208.14(d)";

e. Removing paragraph (f); and

f. Redesignating paragraph (g) as paragraph (f), to read as follows:

§ 208.24 Revocation of asylum or withholding of deportation.

(a) *Revocation of asylum by the Assistant Commissioner, Office of Refugees, Asylum, and Parole.* Upon motion by the Assistant Commissioner and following an interview by an asylum officer, the grant to an alien of asylum made under the jurisdiction of an asylum officer or a district director may be revoked if, by a preponderance of the evidence, the INS establishes that:

* * *

(b) *Revocation of withholding of deportation by the Assistant Commissioner, Office of Refugees, Asylum, and Parole.* Upon motion by the Assistant Commissioner and following an interview by an asylum officer, the grant to an alien of withholding of deportation made under the jurisdiction of an asylum officer or a district director may be revoked if, by a preponderance of the evidence, the INS establishes that:

* * *

(c) *Notice to applicant.* Upon motion by the Assistant Commissioner to revoke asylum status or withholding of deportation, the alien shall be given notice of intent to revoke, with the reason therefore, at least thirty days before the interview by the asylum officer. The alien shall be provided the opportunity to present evidence tending to show that he or she is still eligible for asylum or withholding of deportation. If the asylum officer determines that the alien is no longer eligible for asylum or withholding of deportation, the alien shall be given written notice that asylum status or withholding of deportation along with employment authorization are revoked. Notwithstanding any provision of this section, an alien granted asylum or withholding of deportation who is subject to revocation because he or she has been convicted of an aggravated felony is not entitled to an interview before an asylum officer.

* * * * *

PART 236—EXCLUSION OF ALIENS

20. The authority citation for part 236 continues to read as follows:

Authority: 8 U.S.C. 1103, 1182, 1224, 1225, 1226, 1362.

21. Section 236.3 is amended by:
- Revising the introductory text in paragraph (a);
 - Removing from the first sentence in paragraph (b) the citation “§ 208.4(b)” and adding in its place the citation “§ 208.4(c)”;
 - Revising the second sentence in paragraph (b);
 - Removing, wherever it appears in paragraph (c), the phrase “Immigration Judge” and adding in its place the phrase “immigration judge”;
 - Removing, wherever it appears in paragraph (c)(4), the phrase “Trial Attorney” and adding in its place the phrase “trial attorney”;
 - Removing in paragraph (d) the phrase “Immigration Judge” and adding in its place the phrase “immigration judge”; and
 - Removing in paragraph (d) the phrase “Trial Attorney” and adding in its place the phrase “trial attorney”, to read as follows:

§ 236.3 Applications for asylum or withholding of deportation.

(a) If the alien expresses fear of persecution or harm upon return to his or her country of origin or to a country to which the alien may be deported after a determination of excludability from the United States pursuant to part 237 of this chapter, and the alien has not been referred to the immigration judge

by an asylum officer in accordance with § 208.14(b) of this chapter, the immigration judge shall: * * *

(b) * * * Upon receipt of an application that has not been referred by an asylum officer, the Office of the Immigration Judge shall forward a copy to the Department of State pursuant to § 208.11 of this chapter and shall calendar the case for a hearing. * * *

PART 242—PROCEEDINGS TO DETERMINE DEPORTABILITY OF ALIENS IN THE UNITED STATES: APPREHENSION, CUSTODY, HEARING, AND APPEAL

22. The authority citation for part 242 continues to read as follows:

Authority: 8 U.S.C. 1103, 1182, 1186a, 1251, 1252, 1252 note, 1252b, 1254, 1362; 8 CFR part 2.

23. 242.17 is amended by:
- Removing, wherever it appears in paragraph (c)(1), the phrase “Immigration Judge” and adding in its place the phrase “immigration judge”;
 - Revising the introductory text in paragraph (c)(2);
 - Removing from the first sentence in paragraph (c)(3) the citation “§ 208.4(b)” and adding in its place the citation “§ 208.4(c)”;
 - Revising the second sentence in paragraph (c)(3);
 - Removing from the third sentence in paragraph (c)(3) the phrase “Trial Attorney” and adding in its place the phrase “trial attorney”;
 - Removing, wherever it appears in paragraph (c)(4), the phrase “Immigration Judge” and adding in its place the phrase “immigration judge”;
 - Removing in paragraph (c)(4)(iv) the phrase “Trial Attorney” and adding in its place the phrase “trial attorney”;
 - Removing in paragraph (c)(5) the phrase “Immigration Judge” and adding in its place the phrase “immigration judge”;
 - Removing in paragraph (c)(5) the phrase “Trial Attorney” and adding in its place the phrase “trial attorney”; and
 - Adding in paragraph (e) a new sentence immediately after the first sentence, to read as follows:

§ 242.17 Ancillary matters, applications.

- * * * * *
- (c) * * *
- (2) If the alien expresses fear of persecution or harm upon return to any of the countries to which the alien might be deported pursuant to paragraph (c)(1) of this section, and the alien has not previously filed an application for asylum or withholding of deportation that has been referred to

the immigration judge by an asylum officer in accordance with § 208.14(b) of this chapter, the immigration judge shall: * * *

(3) * * * Upon receipt of an application that has not been referred by an asylum officer, the Office of the Immigration Judge shall forward a copy to the Department of State pursuant to § 208.11 of this chapter and shall calendar the case for a hearing. * * *

* * * * *

(e) * * * However, nothing in this section shall prohibit the INS from using information supplied in an application for asylum or withholding of deportation submitted to an asylum officer pursuant to § 208.2 of this chapter on or after January 4, 1995 as the basis for issuance of an Order to Show Cause under § 242.1 or to establish alienage or deportability in a case referred to an immigration judge under § 208.14(b) of this chapter.

24. § 242.18 is amended by:
- Revising the section heading;
 - Removing, wherever it appears in paragraph (a), the phrase “special inquiry officer” and adding in its place the phrase “immigration judge”;
 - Removing, wherever it appears in paragraph (b), the phrase “special inquiry officer” and adding in its place the phrase “immigration judge”;
 - Revising the heading in paragraph (c); and
 - Removing, wherever it appears in paragraph (c), the phrase “special inquiry officer” and adding in its place the phrase “immigration judge”, to read as follows:

§ 242.18 Decision of the Immigration Judge.

* * * * *

(c) *Order of the immigration judge.*

* * *

PART 274a—CONTROL OF EMPLOYMENT OF ALIENS

25. The authority citation for part 274a continues to read as follows:

Authority: 8 U.S.C. 1101, 1103, 1324a; 8 CFR part 2.

26. Section 274a.12 is amended by:
- Revising paragraph (c)(8);
 - Revising the first sentence in paragraph (c)(10);
 - Removing in paragraph (c)(11) the word “emergent” and adding in its place the word “emergency”; and
 - Removing and reserving paragraph (c)(13), to read as follows:

§ 274a.12 Classes of aliens authorized to accept employment.

* * * * *

(c) * * *

(8) An alien who has filed a complete application for asylum or withholding of deportation pursuant to part 208 of this chapter, whose application has not been decided, and who is eligible to apply for employment authorization under § 208.7 of this chapter because the 150-day period set forth in that section has expired. Employment authorization may be granted according to the provisions of § 208.7 of this chapter in increments to be determined by the Commissioner and shall expire on a specified date;

(10) An alien who has filed an application for suspension of deportation pursuant to part 244 of this chapter, if the alien establishes an economic need to work. * * *

(13) [Reserved].

27. § 274a.13 is amended by revising paragraph (a), and the first sentence in paragraph (d), to read as follows:

§ 274a.13 Application for employment authorization.

(a) *General.* Aliens authorized to be employed under § 274a.12(a)(3)-(8) and (10)-(13) must file an Application for Employment Authorization (Form I-765) in order to obtain documentation evidencing this fact.

(1) Aliens who may apply for employment authorization under § 274a.12(c) of this part, except for those who may apply under § 274a.12(c)(8), shall file a Form I-765 with the district director having jurisdiction over the applicant's residence, or the district director having jurisdiction over the port of entry at which the alien applies, or with such other INS office as the Commissioner may designate. The approval of applications filed under § 274a.12(c) of this part, except for § 274a.12(c)(8), shall be within the discretion of the district director. Where economic necessity has been identified as a factor, the alien must provide information regarding his or her assets, income, and expenses in accordance with instructions on Form I-765.

(2) An initial application for employment authorization (Form I-765) filed under § 274a.12(c)(8) of this part shall be filed in accordance with the instructions on or attached to Form I-765, with the appropriate Service Center or with such other INS office as the Commissioner may designate. The applicant also must submit a copy of the underlying application for asylum or withholding of deportation, together with evidence that the application has been filed in accordance with §§ 208.3

and 208.4 of this chapter. An application for an initial employment authorization filed in relation to a pending claim for asylum shall be adjudicated in accordance with § 208.7 of this chapter. An application for renewal or replacement of employment authorization submitted in relation to a pending claim for asylum, as provided for in § 208.7 of this chapter, shall be filed, with fee or with application for waiver of such fee, in accordance with the instructions on or attached to Form I-765, with the appropriate Service Center or with such other INS office as the Commissioner may designate. The Service Center shall adjudicate the application within 30 days of receipt.

(d) *Interim employment authorization.* The district director shall adjudicate the application within 90 days from the date of receipt of the application by the INS, except in the case of an initial application for employment authorization under § 274a.12(c)(8), which is governed by paragraph (a)(2) of this section. * * *

PART 299—IMMIGRATION FORMS

28. The authority citation for Part 299 continues to read as follows:

Authority: 8 U.S.C. 1101, 1103; 8 CFR part 2.

29. The table in § 299.5 is amended by revising the entry for form I-589 to read as follows:

§ 299.5 Display of control numbers.

INS form No.	INS form title	Currently assigned OMB control No.
I-589	Application for Asylum and for Withholding of Deportation.	115-0086

Dated: November 29, 1994.

Janet Reno,

Attorney General.

[FR Doc. 94-29724 Filed 12-2-94; 8:45 am]

BILLING CODE 4410-01-P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Office of Federal Housing Enterprise Oversight

12 CFR Chapter XVII and Part 1700

RIN 2501-AB59

Establishment of Chapter; Organization and Functions, and Seal

AGENCY: Office of Federal Housing Enterprise Oversight, HUD.

ACTION: Final rule.

SUMMARY: By this document, the Office of Federal Housing Enterprise Oversight (OFHEO) establishes a new chapter in the Code of Federal Regulations for publication of its rules, regulations, and policy statements. Along with the establishment of the chapter, OFHEO adopts final regulations containing a description of its organization and a description of its seal and logo.

EFFECTIVE DATE: December 5, 1994.

FOR FURTHER INFORMATION CONTACT: Anne E. Dewey, General Counsel, Office of Federal Housing Enterprise Oversight, 1700 G Street NW, 4th Floor, Washington, DC 20552, (202) 414-3800.

SUPPLEMENTARY INFORMATION: Title XIII of the Housing and Community Development Act of 1992, Pub. L. 102-550, known as the Federal Housing Enterprises Financial Safety and Soundness Act of 1992, 12 U.S.C. 4501 et seq., established the Office of Federal Housing Enterprise Oversight (OFHEO) as an independent office within the Department of Housing and Urban Development. The primary function of OFHEO is to ensure the financial safety and soundness and the capital adequacy of the nation's two largest housing finance institutions—the Federal National Mortgage Association and the Federal Home Loan Mortgage Corporation. This document establishes the regulations of OFHEO in title 12, chapter XVII of the Code of Federal Regulations. These regulations delineate the origination of OFHEO, the duties and functions of its Director, and the organization and functions of OFHEO's various offices.

Regulatory Impact

Administrative Procedure Act

In acting on the regulations, the Office of Federal Housing Enterprise Oversight finds that notice and public comment are unnecessary. Section 553(b)(A) of title 5, United States Code, provides that when regulations involve matters of agency organization, procedure or practice, the agency may publish